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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1942

No. 175

INTERSTATE COMMERCE COMMISSION, et al.,
Appellants,

vs.

INLAND WATERWAYS CORPORATION, et al.,
Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS

BRIEF ON BEHALF OF APPELLANTS,

THE BALTIMORE AND OHIO RAILROAD COMPANY, THE NEW YORK CENTRAL RAILROAD COMPANY, THE NEW YORK, CHICAGO, AND ST. LOUIS RAILROAD COMPANY, THE PENNSYLVANIA RAILROAD COMPANY, ERIE RAILROAD COMPANY AND THE CHESAPEAKE AND OHIO RAILWAY COMPANY

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December 17, 1942.

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Opinions Below.

The opinion of the specially constituted District Court (R. 1663), *Cargill, Inc., et al.* v. *U. S., et al.*, and *Inland Waterways Corporation* v. *U. S., et al.*, is reported in 44 Fed. Supp. 368.

The reports of the Interstate Commerce Commission entitled Investigation and Suspension Docket No. 4718, *Grain Proportionals, Ex-barge to Official Territory*, appear in 246 ICC 353 (R. 19), and 248 ICC 307 (R. 47).

Jurisdiction.

The final decree of the District Court was entered on April 16, 1942 (R. 1677). Petition for appeal was filed (R. 1679) and allowed on May 21, 1942 (R. 1691). Probable jurisdiction was noted by this court on October 12, 1942. The jurisdiction of this court rests on the Urgent Deficiencies Act of October 22, 1913, c. 32, 38 Stat. 208, 219, 220 (Title 28, U.S.C.A., Secs. 47 and 47a) and Section 238 of the Judicial Code as amended (Title 28, U.S.C.A., Sec. 345).

STATEMENT OF THE CASE.

This action was brought in the court below by a barge line operating on the Illinois Waterways, and on other waters and by certain grain dealers engaged in the marketing of grain and grain products at Chicago, Illinois, and elsewhere, against the United States, the Interstate Commerce Commission and six railroads, to enjoin, annul and set aside an order entered by the Interstate Commerce Commission on December 1, 1941, in the proceeding known as Investigation and Suspension Docket No. 4718, *Grain Proportionals, Ex-Barge to Official Territory*, and to enjoin and prohibit the railroads from publishing, filing with the Commission and making effective tariffs or schedules of rates and charges pursuant to that order. By the order, schedules published by certain railroads, including the railroads appellants, to become effective October 15, 1939, restricting the application of proportional rates * on grain and grain prod-

* A proportional rate is one for but part of through transportation. The tariffs always provide rules which show upon just what traffic each proportional rate applies.

ucts (hereinafter termed grain) from Chicago, Illinois, to destinations east thereof so as to prohibit their use on movements from Chicago of grain which had been transported to Chicago by barge via the Illinois Waterways * (hereinafter sometimes termed ex-barge grain), were found not unlawful.

After hearing in due course, a specially constituted District Court on April 16, 1942, entered findings of fact, conclusions of law and a decree granting the injunctive relief sought by complainants, appellees here. By this appeal, appellants seek an order from this court reversing the decree of the court below and remanding the case with instructions that the bills of complaint be dismissed.

Appellants challenge the decree entered by the court below as an attempted exercise of authority with which the court was not clothed by the statute. Appellants contend that the order of the Commission against which this action was brought constituted a valid exercise of the authority with which the Commission was vested, was supported by an adequate record, and reflected proper application of the governing statute, and that the court below was without authority to enter its decree setting the order aside merely because the court reached conclusions which differed from those reached by the Commission upon consideration of the same record.

The questions at issue on this appeal are narrow, and the principal questions may be stated thus:

(1) Was the order of the Interstate Commerce Commission based upon essential findings of fact supported by substantial evidence?

* Similar restrictions of the application of proportional rates provided from certain points other than Chicago were published concurrently, but, for our purposes here, these other restrictions are of but slight significance.

(2) Was the order of the Interstate Commerce Commission based upon the proper application of the rules of law contained in the governing statute, the Interstate Commerce Act, as amended (Title 49, U.S.C.A., Sec. 1 *et seq.*)

(3) Was the action of the court below tantamount to a substitution of its judgment concerning the weight of the evidence for the judgment of the Interstate Commerce Commission?

Other questions at issue are:

(1) Did the appellee, Inland Waterways Corporation, and intervener, A. L. Mechling, doing business as A. L. Mechling Barge Line, have the right to maintain an action to enjoin the aforesaid order of the Interstate Commerce Commission?

(2) Did the court below have jurisdiction to enter a decree against the defendant railroads?

When the railroads published and filed with the Commission the schedules restricting the application of their proportional rates on grain and grain products from Chicago and certain other points to destinations east thereof, appellees, except intervener, A. L. Mechling, and others, filed protests with the Commission against these schedules. Exercising the authority with which it was vested by Section 15(7) of the Interstate Commerce Act, as amended, the Commission entered an order suspending operation of the schedules for a period of seven months from the published effective date thereof and instituted an investigation into and concerning the lawfulness thereof.* Practically speaking, the investigation was limited to consideration of the lawfulness of the suspended schedules, under Sections 1, 2 and 3 of that

* After expiration of the period of enforced suspension, the carriers voluntarily postponed the effective date pending ultimate determination of the proceeding.

Act, as no question was raised concerning the lawfulness of the schedules under other provisions of the statute.

For a clear understanding of the schedules which were the subject of the assailed order entered by the Commission, and before describing them in detail, it seems desirable to explain briefly the integrated structure of the rates on grain and grain products into which these schedules were intended to be woven, the form of the tariffs publishing the rate structure, and the circumstances which caused the publication of the schedules in controversy.

The Rate Structure.

Succinctly stated, the through charges for the transportation of grain and grain products by rail between points in various sections or territories of the United States have been, and are, determined by the application of a system of proportional rates to and from points, including Chicago, known as gateways. Most of these gateways are important grain markets. Many of these rates have been prescribed by the Interstate Commerce Commission. Constituting merely parts of the through charges, the proportional rates bear no definite relation to the local rates to and from the same gateways, although in all instances they are lower than the local rates. The system of proportional rates is of many years standing.

The primary purpose of the proportional rate adjustment here considered is to provide an equalization of through charges from any given point of origin in one territory to any given point of destination in another territory via numerous routes through several gateways. To a limited extent, the proportional rates are designed also to provide a relative equality of through charges for hauls of substantially the same length from

s competitive origin territories through common
ays to common points of destination.

territories with which we are concerned in this
ay be described generally * as follows:

THWEST TERRITORY is comprised generally of the
of North and South Dakota, Minnesota, Wiscon-
lichigan (upper peninsula), Montana, Wyoming,
, Oregon and Washington, and certain provinces
Dominion of Canada.

NS-MISSISSIPPI RIVER TERRITORY is comprised prin-
y of the states of Arizona, Arkansas, Colorado,
is, Missouri, New Mexico, Nebraska, Oklahoma,
, and certain stations in Iowa and South Dakota.

FICIAL TERRITORY is generally all that territory east
e Mississippi River and north of the Ohio-Potomac
s, except the northern peninsula of Michigan and
it a small section of southern Wisconsin. Official
tory is itself divided into three sub-territories:
-al Freight Association or Central Territory is that
on west of a line drawn through Buffalo and Pitts-
h. Trunk Line Territory includes the area between
ral Territory and the New England States, and
England Territory is comprised of the New England
es.

rtain points, such as Chicago and Peoria, Illinois,
gateways to Official Territory, common to the move-
t of grain from both Northwest and Trans-Missis-
i River Territories.

o preserve the integrity of the rate levels and the
way equalization, it has been necessary to provide
portional rates from the gateways which vary in

* The precise boundaries of the Northwest Territory and Trans-
ssippi River Territory are shown in the various notes carried on
s 4 and 5 of Exhibit 1 (R. E. 1, introduced R. 220). To conserve
and details, we have here given but a general picture of these
ories

amounts according to the origin of the traffic. Thus, from Chicago to Toledo, Ohio, the proportional rate is 15½ cents per 100 pounds * on grain originating in the Northwest and 12½ cents on grain originating in Trans-Mississippi River Territory. From Peoria, Illinois, to Toledo, the proportional rates are 15½ cents on grain originating in the Northwest and 14½ cents on grain originating in Trans-Mississippi River Territory. The proportional rates from Minneapolis (in Northwest Territory) to Chicago and Peoria are 13 cents, hence the proportional rates from Chicago and Peoria on ex-Northwest grain are the same, 15½ cents, to equalize the through charges from Minneapolis to Toledo via these two intermediate gateway markets. The proportional rates from Kansas City (in Trans-Mississippi River Territory) are 14 cents to Peoria and 16 cents to Chicago. To equalize the through charges from Kansas City to Toledo via these two intermediate gateways and at the same time to equalize the through charges from Kansas City with the through charges from Minneapolis, the proportional rates on the Kansas City traffic from Peoria to Toledo are 14½ cents and from Chicago to Toledo are 12½ cents.**

The adjustment of proportional rates from the gateways of Chicago and Peoria to Toledo are typical of the general adjustment from these gateways to all destinations in Central Territory.

The rates from Kansas City, Minneapolis, and all other western origins to Chicago, Peoria and other gateways to Official Territory were prescribed by the Commission in its Docket 17000, Part 7, *Grain and Grain Products Within the Western District and for Export*,

* Rates stated hereinafter are per 100 pounds. All rates stated are for shipments in carloads.

** These and other examples are given on Exhibit No. 7, R. E. 38, introduced R. 220.

215 ICC 83, 223 ICC 235, and 231 ICC 793. The proportional rates from these gateways to Central Territory were prescribed by the Commission in *Southwestern Millers League* v. *A. T. & S. F. Ry. Co.*, 225 ICC 195, and 227 ICC 795.

To destinations in Trunk Line and New England Territories, hereinafter sometimes termed "the East," grain from the Northwest and grain from Trans-Mississippi River Territory takes the same proportional rates from Chicago. To New York, for example, this rate is 26 cents. From Peoria, however, the proportional rates to New York are 26 cents on grain from the Northwest, and 28 cents on grain from Trans-Mississippi River Territory. The inbound rates on grain from Minneapolis are the same, 13 cents, to Chicago and Peoria, while the inbound rates on grain from Kansas City are 2 cents higher to Chicago than to Peoria, hence to equalize the through charges to the East via the two gateways the ex-Northwest proportional rates are the same from Chicago and Peoria, while the ex-Trans-Mississippi River proportional rates are 2 cents lower from Chicago than from Peoria.*

Thus it is apparent that the maintenance from each gateway to each destination of several proportional rates, each proportional rate particularly limited to application on grain from a particular origin area, is necessary to effect gateway equalization.

In addition to these varying proportional rates east of the gateways applicable to traffic from the West, there is a local level of rates applicable on grain moving entirely between points within Official Territory. The local rates under this Official Territory level from the gateways were and are higher than any of the several pro-

* These and other examples are given on Exhibit No. 7, R. E. 38, introduced R. 220.

portional rates from the gateways. Grain originating in Illinois may move through Chicago to Central Territory and to the East. There are provided for the movements of such grain from Chicago to Central Territory, proportional rates termed "reshipping rates," which do not correspond either to the ex-Northwest or to the ex-Trans-Mississippi Territory River proportional rates from Chicago to Central Territory.* To the East, through rates are published from the Illinois origins via Chicago, and there is no proportional rate application on such traffic from Chicago.** The inbound interstate rates to Chicago,*** coupled with the proportional reshipping rates outbound to Central Territory, and the through rates via Chicago, to the East produce charges for the through movements reflecting the Official Territory local level of rates.

The Tariff Arrangement.

In order that there be provided east of the gateways the several levels of proportional rates, and the local rates, there are set up in the tariffs various columns of rates, each proportional rate column being controlled in its application by a note. An illustration of the tariff arrangement is furnished by the first three pages of Exhibit 68 (R. E. 104, introduced R. 1394), showing the various rate columns with the note numbers governing each column, and by Exhibit 1 (R. E. 1, introduced R.

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* Representative examples of these reshipping rates are shown on Exhibit No. 68, R. E. 104, introduced R. 1394.

** Representative examples of these through rates are shown on Exhibit No. 9, R. E. 43, introduced R. 220, and on Exhibit 13, R. E. 60, introduced R. 237. The restriction against application of proportional rates from Chicago on traffic originating at points from which through rates are published, is provided in Note 20, Agent Jones' Tariff Series ICC 1373, which note is included as page 19 of Exhibit No. 1, R. E. 1, introduced R. 220, and which is reproduced hereinafter as Appendix 1-a.

*** Examples of which are shown on Exhibit No. 4, R. E. 30, introduced R. 220.

220), pages 4, 6 and 19, showing the provisions of the several governing notes.*

The Circumstances Which Caused the Publication of the Schedules in Controversy.

We here summarize further evidence supporting the findings of the Commission, which evidence develops the circumstances causing publication of the schedules in controversy.

Prior to 1933, there was no movement of grain by barge via the Illinois Waterways to Chicago. There was, however, a movement of grain via lake steamer to Chicago, which grain originated principally in the Northwest (R. 1312). In 1933, the channel of the Illinois River was opened to traffic (R. 298). Thereafter Illinois grain, chiefly corn, for the first time (R. 432-433) began to move by barge to Chicago from various origins located along the Illinois Waterways. The proportional rates were accorded to this ex-barge traffic under tariff provisions published prior to the inauguration of barge service on the Illinois Waterways and not intended (R. 218 and 273-274) to provide for application on such traffic, although unfortunately they were not specifically restricted against it (R. 257).

The note governing the ex-Northwest proportional rates from Chicago to destinations in Central Territory was published to apply on "shipments which arrive by boat line at Chicago," without restriction as to the origin of grain so arriving. The other proportional rates ap-

* Pages 4 and 6 of Exhibit 1 carry the notes governing the application of each of the proportional rate levels to Central Territory destinations, named in the columns headed "Trans-Mississippi River," "Northwest," and "Reshipping." Page 19 of Exhibit 1 carries the note governing the application of the proportional rate level to the East, named in the column headed "Proportional." The Note 20 governing application of the "Trans-Mississippi River" rates is found on page 4 of Exhibit 1, and is not the same as the Note 20 governing application of the "Proportional" rates, which latter note is found on page 19 of Exhibit 1.

plicable east of Chicago to destinations in Central Territory were restricted to apply only on grain originating *in a particular area irrespective of the method of transportation to Chicago.** Hence to destinations in Central Territory, the ex-Northwest proportional rates and only those proportional rates were applicable to, and in fact were applied to, grain originating in Illinois moving to Chicago via the Illinois Waterways and therefore arriving at Chicago "by boat line," although these proportional rates did not apply on grain from the same origins which moved to Chicago by any other form of transportation.

The note governing the application of the proportional rates east of Chicago to destinations in the East, effective since January 15, 1924 (as shown by page 19, Exhibit 1, *supra*), made applicable the proportional rates on traffic reaching the reshipping point via "a rail or water transportation line." Because this note also was inappropriately restricted, the proportional rates to the East were likewise applied on Illinois grain arriving at Chicago via the Illinois Waterways, although these rates did not apply on such grain arriving at Chicago via any other form of transportation.**

The history of the notes governing the application of the proportional rates was shown in Exhibit 1 (R. E. 1, introduced R. 220) and in Exhibits 96, 98 and 99 (submitted after close of hearing in response to a request,

* The reshipping proportional rates on grain from the Illinois origins are restrcted so as not to apply on grain moving via water transportation line. (Note 45, page 6, Ex. 1, R. E. 1, introduced R. 220).

** The proportional rates are limited by the note so as to become applicable only on traffic originating at points from which no joint through commodity rates are in effect in connection with the inbound carrier via the reshipping point from original point to final destination. There are joint through commodity rates from Illinois origins to destinations in the East, via Chicago. Exhibit 13 (R. E. 60, introduced R. 237) shows what are termed "Specifics," which are the unpublished (R. 248) proportions to Chicago of one-factor through commodity rates from Illinois origins to eastern destinations. Division 2 of the Commission discussed these through rates and specifics in 246 I. C. C. 353, 356.)

R. 1660, the Examiner ruling at R. 1661 that the material could be submitted within fifteen days after close of hearing).

Rates to and from the equalized gateways were shown in Exhibits No. 7 (R. E. 38, introduced R. 220, explained R. 218) and No. 8 (R. E. 41, introduced R. 220, explained R. 219). These exhibits illustrate (R. 218, 219) the varying rates from the respective origin areas to common gateways and the proportional rates from the gateways varying in measure necessary to effect equalization of through charges via the common gateways. Reference was made to *Southwestern Millers League* v. *A. T. & S. F.*, 225 ICC 195, 227 ICC 795, in which case the Commission prescribed the proportionals from the gateways to destinations in Central Territory for the purpose of equalizing the through charges on grain from the Northwest with the through charges on grain from Trans-Mississippi origins for comparable through movements, at the same time preserving the gateway equalization from each origin area (R. 218).

It was shown that this ex-barge grain originated in Illinois.* The volume of receipts and shipments of grain at and from Chicago were shown by years (first 9 pages of Exhibit 19, R. E. 80, introduced R. 435, explained R. 432-433; and Exhibit 38, R. E. 89, introduced R. 709, explained R. 705). The volume of this Illinois grain (prin-

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Mr. A. L. Mechling stated that he made his first trip up the waterways to Chicago in the fall of 1935 (R. 909) and that during the last several years he has handled grain from Havana, Pekin, Peoria, Lacon, Hennepin, LaSalle, Ottawa, Seneca, and Morris, Illinois (R. 925). Morris, Illinois, was shown to be the largest shipping point of this barge grain moving to Chicago (R. 941). Seneca, Ottawa and LaSalle were large shipping points ranking second to Morris (R. 941). The Allied Barge Company handled almost entirely grain of the Cooperative Allied Grain Dealers Corporation (R. 726) from Morris and Seneca, Illinois (R. 741), at which points that company has facilities (R. 713). Information showing the amount of Illinois grain moving to Chicago via the waterways for the year 1939 is given at Record 1654. This information shows that the A. L. Mechling Barge Line handled the largest volume and that the Allied Barge Line ranked second. It shows also the number of trips and the total weight in pounds handled by each barge line.

cipally corn), arriving via the Illinois Waterways increased substantially after 1935, as shown by Exhibit 19 above and by R. 1654.

It was shown that there were no arrangements with any of the barge lines for the operation of through routes from the origins of the grain through Chicago to final destinations east thereof (R. 1052; see also as to Mechling, R. 985; as to Inland Waterways, R. 1225 and their complaint Sec. 10, R. 5). The Inland Waterways Corporation was shown to handle little of this Illinois grain by barge to Chicago (R. 750 and 1240-41 and Exhibit 63, R. E. 101, introduced R. 1252).

While, prior to the opening of the Illinois Waterways, grain had arrived at Chicago "by boat line" or "via water-transportation line," that grain had originated principally in the Northwest (R. 1312), with exceptions due to drought conditions in Illinois and the West (R. 433-434).

Substantial quantities of grain from the origin area along the Illinois Waterways was trucked to Chicago, but the proportional rates did not apply on such grain. Those who handled truck grain complained and contended that if the proportionals continued to apply on ex-barge grain they should be applied also to the ex-truck grain (R. 493).

As previously explained, grain originating in Illinois and moving via rail via Chicago either to Central Territory or the East pays rates reflecting the Official Territory local level. Exhibit 11 (R. E. 55, introduced R. 220, explained R. 219-220) shows the local level and that it is below the level approved as a maximum reasonable basis for grain rates within Official Territory in quite a number of cases cited in the decision of Division 2 in the present case (246 ICC 353, at 366).

Comparisons were made of the total charges from

this Illinois origin area, barge to Chicago, plus proportional rates via rail to the East, with all-rail rates from a large territory running as far east as eastern Indiana and Michigan (Exhibits 5, R. E. 35, introduced R. 220, explained R. 216; and 6, R. E. 37, introduced R. 220, explained R. 217; and Exhibit 9, R. E. 43, introduced R. 220, explained R. 219; and Exhibit 61, R. E. 99, introduced R. 1052, explained R. 1054). It is shown in the exhibits referred to, that grain originating on a railroad at points quite some distance east of Chicago and moving east therefrom via rail, paid a transportation charge greater than the through transportation charge paid by grain originating in Illinois moving to Chicago by barge and thence for a longer haul by rail to the same destination in Official Territory.

Exhibit 5 shows that to common destinations in Official Territory the total through transportation charges on grain from the origin area along the waterway in Illinois moving via barge to Chicago, thence East by rail were lower than the charges on all rail traffic originating at any point on the B. & O. R. R. Co. west of Avilla, Indiana; also lower than on traffic originating at any point on the Erie Railroad west of Uniondale, Indiana; and at any point on the Grand Trunk west of South Bend, Indiana; at any point on the Michigan Central west of Galien, Michigan; at any point on the N. Y. C. west of Kendallville, Indiana and Jonesville, Michigan; at any point on the N. Y. C. & St. L. west of Rutland, Indiana; at any point on the Pennsylvania west of Plymouth, Indiana; and at any point on the Wabash west of North Liberty, Indiana.

Exhibit 6 is a map which graphically illustrates this rate situation. Grain originating any place west of the green line shown on Exhibit 6, which takes in eastern Indiana and Michigan, pays, as shown in Exhibit 5,

charges for its transportation all-rail greater than the total barge and rail charges paid by grain originating in Illinois, moving to Chicago by barge, thence rail to the same destination. The ex-barge grain receives a greater rail haul than any grain originating on these railroads in this area shown on Exhibit 6, east of Chicago. There is a substantial production of grain in that part of Indiana west of the green line shown on Map Exhibit 6 (R. 520-521). This grain moves to the East and Southeast (R. 521).

The lower total charges on grain moving barge to Chicago, thence rail, result from the use of the proportional rates east of Chicago, as such grain arrives "by boat lines" or "via water transportation lines."

The eastern rail carriers were shown to have substantial mileage in Illinois (R. 265). In order to meet the competition of the waterways resulting from the lower total charges on grain moving by barge to Chicago and thence east by rail, the eastern rail lines made some reductions in their all-rail rates from certain Illinois origins adjacent to the waterways (R. 257). Nevertheless, the waterway competition became more acute, even east of the Illinois-Indiana state line (R. 265). Ultimately, it became apparent that some other action was necessary to prevent further reductions and continued and ever-spreading disturbance of the rate level in and east of that area, a rate level already very low (R. 265-266). Restricted application of the proportional rates from Chicago was proposed to prevent further disruption of the all-rail rate structure from Illinois, Indiana and Michigan to Official Territory (R. 265-266 and see Exhibit 5, R. E. 35, introduced R. 220, explained R. 216).

It was shown that due to the competition, grain was being trucked cross-country for some forty miles to get

to the waterway at Morris, Illinois, when the origin itself was only sixty miles by barge from Chicago (R. 258-259). Morris is itself 57.7 miles by barge from Chicago (see Exhibit 67, R. E. 102, introduced R. 1394).

An illustration of what could be saved by having the grain arrive at Chicago in a boat, thus obtaining the use of the proportional rates, is furnished by Exhibits 69 (R. E. 107, introduced R. 1394) and 67 (R. E. 102, introduced R. 1394). Exhibit 69 shows that the barge-rail total cost from Morris, Illinois, to Circleville, Ohio, was 7.25 cents less than the all-rail rate. Exhibit 67 shows that the saving secured by moving the grain via water transportation from Morris to Chicago was 1.25 cents under the intrastate rate level, and 5.75 cents under the interstate rate level. However, for the through transportation, the shipment ended up with a saving greater than the saving attributable merely to the use of the water route to Chicago. This was brought about by the use of the proportional rate levels east of Chicago.

The carriers pointed out that if this proportional rate level east of Chicago was continued on traffic originating within Illinois in Official Territory, within the vicinity of the river, it would favor these Illinois shippers by barge to the prejudice of other shippers within Official Territory (R. 289, 336).

Peoria, Illinois, is a river port (R. 463) and a gateway, equalized with Chicago on ex-Northwest and ex-Trans-Mississippi River grain (see Exhibit 7, R. E. 38, introduced R. 220). However, the proportional rates from Peoria to Central Territory did not apply on Illinois grain reaching Peoria by water; *i.e.*, on ex-barge grain (Notes 40 and 45, page 6 of Exhibit 1, R. E. 1, introduced R. 220), and the proportional rates from Peoria to the East had no practical application to ex-barge grain, because they were subject to a requirement

that the combination of the rates to and from the reshipping point (Peoria), be not less than the local rate from the reshipping point (Note 40, page 17 of Exhibit 1, *supra*). The proportional rates from Chicago to the East were subject to a somewhat similar requirement which, however, was limited to traffic moving into Chicago by rail. The Peoria interests complained of the more liberal application of the proportional rates from Chicago, and they supported the restrictions proposed by the eastern lines because these restrictions provided a relative equality of treatment of the two gateways with respect to ex-barge traffic (R. 468-469), where the distinction is explained, and R. 464 where it is contended that this difference in treatment should be cleared up).

The practical effect of the application of the proportional rates on ex-barge grain from Illinois was to accord the shippers of grain by barge an undue advantage and to seriously disturb the sensitive grain rate structure. To preclude the further application of these proportional rates on ex-barge grain and thereby to rectify the situation which threatened to disrupt the grain rate structure over a wide territory, the rail carriers engaged in the transportation of grain eastbound from Chicago published the schedules which resulted in this litigation.

The Suspended Schedules.

The provisions stated in the schedules, the operation of which was suspended by the Commission's initial order in the proceeding, varied in form; but all, in effect, provided that the proportional rates from Chicago and the other gateways to Official Territory, to Central Territory and to the East, would not apply on traffic moving to such gateways via the Illinois Waterways. The provisions with which we are here concerned primarily, are

contained in Appendix 1-b hereto, quoting the note governing the application of proportional rates to the East, and in Appendix 1-d hereto, quoting the note governing the application of the ex-Northwest proportional rates to Central Territory. The pertinent provision of each of these notes—the provisions about which this entire controversy really centers—reads substantially as follows:

> "Will not apply on Ex-River, Canal, River-Canal or Canal-River traffic, arriving via Illinois waterways, viz: Rivers, Canals, and connecting waterways."

The revision of some of the other notes was effected simply by eliminating all reference to the application of the rates which they governed on any ex-water traffic.

Each of the several suspended provisions and each of the provisions which the former were intended to supersede are reproduced in full in Exhibit 1, pages 7 to 9 and 22 to 28 (R. E. 1, introduced R. 220).

While there were several tariff provisions governing the application of proportional rates from several gateways to destinations throughout Official Territory, only the notes governing the application of the ex-Northwest proportional rates from Chicago to Central Territory and of the proportional rates from Chicago to the East are of significance, because the other proportional rates from Chicago and the proportional rates from the other gateways were so restricted in one form or another, as to have no practical application on Illinois grain arriving at Chicago or at such other gateways via the Illinois Waterways. All of the Illinois grain which has moved via the Illinois Waterways has moved to the Chicago gateway. It is our purpose to limit the discussion of the provisions which are the subject of this litigation, to the two provisions aforementioned, repro-

duced in Appendices 1-b and 1-d hereto, which, if made operative, would cause the only material change in the application of the proportional rates east of any of these gateways. The notes presently effective, due to the suspension, are carried in Appendices 1-a and 1-c hereto.

Decision by Commission.

Following the hearing, an Examiner's proposed report, exceptions thereto, and oral argument, Division 2 of the Commission rendered its decision dated July 31, 1941 reported in 246 ICC 353 (R. 19). In this decision, it was found that the proposed schedules were not shown to be unlawful. Petitions for reconsideration of this decision were filed, and thereafter the entire Commission, under date of December 1, 1941, rendered its decision, reported in 248 ICC 307 (R. 47), the Commission concluding:

> "The proposed schedules are shown to be just and reasonable and are not shown to be otherwise unlawful."

This final determination of the Commission was supported by findings throughout the several reports, the substance of which findings we carry as Appendix 4 hereto.

SPECIFICATION OF ASSIGNED ERRORS TO BE URGED.

The assignments of errors relied upon are printed in Appendix 3 to this brief. Assignment No. 3 challenges the jurisdiction of the District Court over the carrier defendants. Assignment No. 4 challenges the right of the Inland Water Corporation and A. L. Mechling, intervener, to bring and maintain their suit to set aside the order of the Interstate Commerce Commission. Assignments Nos. 2, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 23 and 24 are addressed to appellants' contention

t the court below did not appreciate the nature and ent of court review of orders of the Interstate Com-rce Commission, and did not remain within the proper ge of issues presented in such a case. Assignments s. 1, 6, 10, 11, 19, 20, 21, 23 and 24 are addressed appellants' contention that the order of the Commis-n was based upon essential findings of fact supported substantial evidence and reflected proper application the governing provisions of the Interstate Commerce t.

SUMMARY OF ARGUMENT.

1. Court review of an order of the Interstate Commerce Commission is confined within a narrow scope. Administrative orders are not to be disturbed except upon a showing that they are unsupported by evidence, were made without a hearing, exceed constitutional limits, reflect errors of law, or for some other reason amount to an abuse of power. *Board of Trade of Kansas City* v. *U. S.*, 314 U. S. 534, 546. Other like cases are cited in the argument. The Court may not consider weight of evidence or soundness of reasoning. (*Virginian Ry. Co.* v. *U. S.*, 272 U. S. 658, 663), nor substitute its judgment as to existence of preference for that of the Commission (*U. S.* v. *L. & N. R. R. Co.*, 235 U. S. 314, 320).

2. The Commission made essential findings (carried in Appendix 4 herein) which are amply supported by the evidence summarized in the Statement of the Case, *supra*. Court and Commission differ not in regard to facts, but on conclusions drawn from the facts. The principal differences * between Court and Commission have to do with the proper construction of proportional rates and just what portion of the rate structure was being protected by the Commission; *i.e.*, whether the local rates from Illinois to Chicago or the general rate structure.

In only one respect did the court suggest that there was no evidence to support a finding. The Court found (finding No. 18) there was no evidence to support the finding of the Commission, that the proposed schedules

* In addition, there are two minor differences between Court and Commission which are fully answered in the body of argument where all differences between Court and Commission are shown.

will not prohibit the movement by barge-rail, even to Trunk Line Territory. There was evidence on this point (R. 267, 268, 269). Value and weight of evidence, and inferences to be drawn therefrom, are for the Commission. *U. S. v. Pan American Corp.*, 304 U. S. 156, 158.

3. The Court, because physical carriage beyond the reshipping point was substantially the same for ex-barge, ex-lake and ex-rail grain, concluded that ex-barge grain should not lawfully be required to pay a greater charge than did ex-rail and ex-lake grain for that service. Finding that the transportation in and out of Chicago was not a continuous through movement, and that the commercial attributes of the inbound shipment were separate from those of the outbound movement, the Court concluded that the rates east of the gateway should not vary (for that movement which was substantially the same) dependent upon origin of the traffic, method of transportation to the gateway or any other transportation factors pertaining to the inbound movements. The Commission (248 ICC 307, 311) stated:

> "To adopt protestants' premise would mean that all proportional rates lower than local rates and differing from each other according to origin of the commodity would have to be condemned. * * * reshipping or proportional rates are in their essence balances of through rates. Such balances are, of course, determined by the measure of the inbound and through rates and properly may vary according to the relative length and nature of the inbound and through service."

All the circumstances and conditions attendant upon the handling of the traffic, including prior or subsequent movements, must be considered in determining lawfulness under Section 2 of the Interstate Commerce Act ((Appendix 2, e) prohibiting common carriers from charging any person greater or less compensation for any service rendered in the transportation of passenger

or property, subject to part one, than it charges any other person for doing a like and contemporaneous service in the transporation of a like kind of traffic under substantially similar circumstances and conditions.) *T. & P. Ry. Co.* v. *I. C. C.*, 162 U. S. 197; *I. C. C.* v. *B. & O. R. R. Co.*, 145 U. S. 263, 281; see also *Union Pac. Ry. Co.* v. *U. S.*, 117 U. S. 355, 363.

4. A proportional rate is necessarily part of a through rate and capable of use only as such. *Great Northern Ry. Co.* v. *Sullivan*, 294 U. S. 458, 460. The Commission has recognized and followed this principle in numerous decisions cited in the body of the argument. The Commission has had occasion to establish or approve rates for movements which were but parts of through movements, the portion only being within its jurisdiction and in these cases the Commission has shown not only the necessity for consideration of the entire movement of the traffic in order to fix the proper proportional, but it has shown further that a proportional fixed after such a view of the transportation factors involved is lawful and proper. See *Lumber from San Francisco Bay Points*, 78 ICC 760, 766, 767; many other similar cases are cited in the body of the argument.

Traffic from various areas may converge and may move for portions of the total hauls over a common segment. In properly rating the traffic, even for its movement over that common segment, consideration must be given to the respective total movements. Any differences between the total movements must be properly reflected even on the common segment or all rates would be local rates as stated by the Commission in our present case, *supra*. See also *Central Pennsylvania Producers' Coal Asso.* v. *B. & O.*, 196 ICC 203, 235.

5. It is contended by the barge lines that the Interstate Commerce Act, as amended September 18, 1940,

affords them some right to maintain this action, and that the order was predicated on evidence taken before the amendments were effective and based on an improper application of the Act as thus amended, particularly Section 3(4) and the National Transportation Policy. The Panama Canal Act, enacted August 24, 1912, conferred jurisdiction on the Commission in connection with through rail-and-water routes. The empowering provisions were included as Section 6(13) of the Interstate Commerce Act (see Appendix 2, h) long prior to the amendments of 1940. This jurisdiction was supplemented by the Inland Waterways Corporation Act of June 3, 1924 (see Section 3(e), Appendix 2, r). Prior to the amendments of 1940, the Commission in *Procedure under Barge Line Act*, 148 ICC 129, and this Court in *C. R. I. & P. Ry. Co.* v. *U. S.*, 274 U. S. 29, had occasion to consider the extent of the Commission's jurisdiction of through rail-and-water routes, these cases showing that plenary powers did exist. Under Section 15(3) as it read prior to the amendments of 1940 (Appendix 2, j), the Commission could not establish any route, classification, practice or rate when the transportation was *wholly* by water. The amendments of September 18, 1940, are shown in the body of the argument to have given the Commission authority over transportation wholly by water for the first time, but all of the provisions existing prior thereto which had already given the Commission plenary power over through rail-and-water routes, were, by rearrangement of section numbers, simply continued.

The provisions on which the barge lines rely, as effective before and after September 18, 1940, as later shown, have no application unless through routes do, in fact, exist.

6. Under the law as it existed prior to September 18, 1940, the Commission had occasion to consider many

applications of barge lines for through routes and joint rates. (There are ten decisions of the Commission, referred to in the body of our argument, in which applications of the Inland Waterways Corporation were considered, reference also being made to applications of other independent barge lines.) In these proceedings, the Commission gave careful consideration to the question of the reasonableness of the proposed through routes, stating definitely that the establishment of such through rail-and-water routes would be required only when shown to be necessary or desirable in the public interest (*Application of Inland Waterways Corporation*, 153 ICC 129, 133). The rearrangement of the law, continuing the jurisdiction which the Commission had theretofore had in connection with rail-and-water routes, retained the same test as to what would be a proper through rail-and-water route (see Sections 1(4), as amended, 15(3), as amended, and 305(b) and 307(d) as carried in Appendix).

7. A through route is defined by this Court. *St. L. S. W. Ry. Co.* v. *U. S.*, 245 U. S. 136, 139; see also *Great Northern Ry. Co.* v. *Sullivan*, 294 U. S. 458, 460.

There are no through routes between appellee barge lines and the rail carriers in connection with this grain movement (as to Mechling, R. 985; as to Inland Waterways Corporation, R. 1225, and its complaint, Section 10, R. 5; see also R. 1052).

8. A through route must exist before we have "connecting lines" under Section 3(4) of the Interstate Commerce Act (see Section 3(4), as amended, Appendix 2, g, and *Investigation of Seatrain Lines, Inc.*, 206 ICC 328, 343). The Commission specifically noted this point and correctly determined it (see 246 ICC 353, 380, this decision being carried at R. 19).

9. The amendments of September 18, 1940, added a provision to Section 3(1) of the Act (Appendix 2, f)

under which it was specifically provided that that paragraph should not be construed to apply to discrimination, prejudice or disadvantage to the traffic of any other carrier of whatever description. A similar provision was included in the sections governing the water carriers (see Sec. 305(c), Appendix 2, p). These provisions were correctly ruled upon by the Commission in its report in 246 ICC 353, at 363.

10. The order is not in contravention of the National Transportation Policy (Appendix 2, a). See *Mississippi Valley Barge Line Co.* v. *U. S.*, 292 U. S. 282, 288. The Act itself carries many provisions for differences in practices, rates, classifications and regulations, as between water-and-rail and all-rail traffic, which differences were not to be considered unjust (see Section 305 (c) and Section 3(1)). Provision for differentials between all-rail rates and joint water-rail rates is made in Section 307(d) (Appendix 2, q), and provision for special rail proportionals in connection with traffic to or from the port by water was provided for in 6(11) (Appendix 2, i). See also amendment to Section 15(a), considered in *Seatrain Lines, Inc.* v. *A. C. & Y. Ry. Co.*, 243 ICC 199, 214; see also *Naval Stores from Miss. to Gulf Ports*, 235 ICC 723, 733. The National Transportation Policy cannot be interpreted as foreclosing differences between varying kinds of transportation in view of provisions for such differences contained in the Act.

11. The varying proportional rates here involved east of the gateways to destinations in Central Territory were prescribed by the Commission in *Southwestern Millers League* v. *A. T. & S. F. Ry. Co.*, 225 ICC 195, in order to equalize origin areas and maintain gateway equalization. See Supplemental Report in this case, 231 ICC 130, 131. The practice by which grain shipped to a primary market is given, when shipped out, benefit of the low rate which normally would have applied if the grain had been shipped from country origin through to ulti-

mate destination, antedates the enactment of the Interstate Commerce Act. *A. T. & S. F. Ry. Co.* v. *U. S.*, 279 U. S. 768, 778. Pertinent problems connected with grain-rate structure were considered by this Court in *Board of Trade of Kansas City* v. *U. S.*, 314 U. S. 534, 537.

In considering the lawfulness of the suspended schedules, the Commission necessarily was concerned with their effect upon the entire grain-rate structure (see 248 ICC 307, 309-310, R. 52). It was not, as found by the Court (finding No. 23), concerned only with rates to Chicago. In addition, the Commission, at page 309 (R. top 51), referred to the earlier report where Division 2 stated that continuance of present conditions would result in a break-down of the all-rail grain-rate structure from adjacent origins in Illinois and Indiana. The matter in the earlier report thus referred to is set out in 246 ICC 353, 375, where the Division stated that continuance of present conditions would result in disruption of the "the grain-rate structure as far east as Painesville, and East Liverpool, Ohio, the latter being approximately 300 miles from Baltimore."

As stated by the Commission (248 ICC 307, 311):

> "To adopt protestants' premise would mean that all proportional rates lower than local rates and differing from each other according to the origin of the commodity would have to be condemned."

It would be futile for the Commission to prescribe an adjustment, as it did in *Southwestern Millers' League case, supra*, if it did not also have the power to protect such an adjustment, even by the circumscription of its use where necessary to prevent unintended and disturbing application.

12. The Commission has power to protect a reasonable rate adjustment. *Youngstown Sheet & Tube Co.* v. *U. S.*, 295 U. S. 476, 479. To accomplish this purpose,

the Commission may close a route. *Western Paper Makers' Chemical Co.* v. *U. S.*, 271 U. S. 268, 272.

13. The rail lines are not proper parties defendant. Section 46 of the Urgent Deficiencies Act (Appendix 2, s) provides for suit against the United States.

The relief prayed for against the individual rail lines, even if right to it existed, which we deny, is not within the jurisdiction of the specially constituted three-judge court. *Powell* v. *U. S.*, 300 U. S. 276; *U. S.* v. *Idaho*, 298 U. S. 105, 109; *P. & W. Va. Ry. Co.* v. *U. S.*, 281 U. S. 479, 488.

14. The Inland Waterways Corporation and A. L. Mechling, intervener, here protecting their competitive position, do not have a right upon which to base the action. *Alexander Sprunt & Son, Inc., et al.* v. *U. S.*, 281 U. S. 249, and other cases cited in body of argument.

ARGUMENT.

Court Review of an Order of the Interstate Commerce Commission Definitely Is Circumscribed.

In court review of an order of the Interstate Commerce Commission, the range of issues is narrow. In substance, they are:

(1) Did the order of the Commission violate the Constitution?

(2) Did the order of the Commission exceed the power conferred by the statute?

(3) Was the order of the Commission predicated upon essential findings supported by substantial evidence?

(4) Did the order of the Commission reflect erroneous application of the law?

(5) Was the order of the Commission entered without due hearing?

(6) Did the order of the Commission reflect an exercise of power so arbitrary as to virtually transcend the authority conferred?

These narrow limits of review have been clearly and definitely outlined by this court in a number of decisions among which are included: *I. C. C.* v. *Ill. Central R. R. Co.*, 215 U. S. 452, 470; *U. S.* v. *B. & O. R. R.*, 225 U. S. 306, 323; *Kansas City So. Ry. Co.* v. *U. S.*, 231 U. S. 423, 440; *I. C. C.* v. *Union Pacific R. R. Co.*, 222 U. S. 541, 547; *U. S.* v. *L. & N. R. R. Co.*, 235 U. S. 314, 320; *Pennsylvania Co.* v. *U. S.*, 236 U. S. 351, 361; *Board of Trade of Kansas City* v. *U. S.*, 314 U. S. 534; *U. S.* v. *Chicago Heights Trucking Co.*, 310 U. S. 344; *Virginian Ry. Co.* v. *U. S.*, 272 U. S. 658, 663; *Seaboard Air Line* v. *U. S.*, 254 U. S. 57, 62; *Rochester Tel. Corp.* v. *U. S.*, 307 U. S. 125.

This circumscription of the limits of judicial review of the orders of an administrative body is stated with particular clarity in the case last cited. We quote from page 139:

> "From these general considerations the Court evolved two specific doctrines limiting judicial review of orders of the Interstate Commerce Commission. One is the primary jurisdiction doctrine, firmly established in *Texas & Pacific Ry. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426. Thereby matters which call for technical knowledge pertaining to transportation must first be passed upon by the Interstate Commerce Commission before a court can be invoked. The other is the doctrine of administrative finality. Even when resort to courts can be had to review a Commission's order, the range of issues open to review is narrow. Only questions affecting constitutional power, statutory authority and the basic prerequisites of proof can be raised. If these legal tests are satisfied, the Commission's order becomes incontestable. *Interstate Commerce Comm'n* v. *Illinois Central R. Co.*, 215 U. S. 452, 470; *Interstate Commerce Comm'n* v. *Union Pacific R. Co.*, 222 U. S. 541."

In the instant case, the issue outlined as No. 1, above requires no consideration for it was not raised by the complaints herein. As we shall explain, the assailed order of the Commission clearly and definitely met the other tests, and the court below erred in failing so to conclude.

A comparison of the findings of the District Court with the findings of the Commission shows that with minor exceptions the Court and the Commission reached similar conclusions as to the facts developed by the record. Upon these facts, the Commission concluded that the schedules in controversy would not operate in violation of Sections 1, 2 and 3 of the Interstate Commerce Act, and would not be otherwise unlawful. Upon

substantially the same facts, however, the court below concluded the the Commission had erred in its application of Sections 2 and 3, and found that the schedules would operate in violation of these sections and in violation of the congressional declaration of the National Transportation Policy expressed at the outset of the Interstate Commerce Act, as amended September 18, 1940. Appellants submit that the court below clearly exceeded the bounds of its narrow sphere of review when it substituted its judgment for the judgment of the Commission concerning the application of Sections 2 and 3 to the evidence developed on the record before the Commission. As we shall explain later, the Commission's application of these provisions of the governing statute was proper and in full accord with numerous expressions of this Court construing, and with the prior decisions of the Commission applying, these provisions.

It has been definitely determined by this Court that whether a preference, advantage, or discrimination is undue, unreasonable, or unjust, is a question of fact confided by Congress to the judgment and discretion of the Commission, and upon which the decision of the Commission is not to be disturbed unless it is shown that the Commission's conclusions are unsupported by evidence, made without a hearing, exceed constitutional limits, or for some other reason amount to an abuse of power. *Board of Trade of Kansas City* v. *U. S.*, 314 U. S. 534; *U. S.* v. *Chicago Heights Trucking Co.*, 310 U. S. 344; *Virginian Ry. Co.* v. *U. S.*, 272 U. S. 658, 663; *Seaboard Air Line* v. *U. S.*, 254 U. S. 57, 62.

A court may not substitute its judgment as to the existence of preference for the judgment of the Commission where there is no dispute concerning the facts. *U. S.* v. *L. & N. R. R. Co.*, 235 U. S. 314, 320.

To consider the weight of evidence, the soundness of

the Commission's reasoning, or even whether the Commission's findings in the case at bar are consistent with findings made by the Commission in other cases is beyond the province of the Court. *Virginian Ry. Co.* v. *U. S.*, 272 U. S. 658, 663; *Georgia P. S. Commission* v. *U. S.*, 283 U. S. 765, 775.

From the principle announced by the decisions cited above, it is evident that the proper sphere of review for the court below did not comprehend consideration of the Commission's application of Sections 2 and 3 of the Interstate Commerce Act to its findings of fact when the court below was in substantial agreement with these findings. The determination by the Commission that the suspended schedules would not contravene the provisions of Sections 2 and 3 of the Act was final. Even though upon the same evidence in an original proceeding before it, the court might have reached conclusions concerning the application of Sections 2 and 3 different from the conclusions reached by the Commission, the court may not substitute its judgment for the judgment of the Commission with respect to the application of these sections where, as here, there is no error in other matters properly subject to judicial review.

As this Court aptly stated in *Rochester Tel. Corp.* v. *U. S.*, 307 U. S. 125, at page 146:

> " 'The judicial function is exhausted when there is found to be a rational basis for the conclusions approved by the administrative body.' *Mississippi Valley Barge Line Co.* v. *United States*, 292 U. S. 282, 286-287; *Swayne & Hoyt, Ltd.* v. *United States*, 300 U. S. 297, 303 *et sequitur*."

The Assailed Order of the Commission Was Supported by Essential Findings Predicated Upon Substantial Evidence.

The court below considered the evidence before the Commission and, generally speaking, made findings of

fact which corresponded in substance to the findings of the Commission, although from such facts the court reached conclusions concerning matters of preference, prejudice and discrimination contrary to the conclusions reached by the Commission. From this alone it should be apparent that the Commission did make the necessary findings upon the evidence before it.

We have outlined in Appendix 4 the substance of the various findings of the Commission as reflected in the report of Division 2 (R. 19), dated July 31, 1941, and in the report of the entire Commission (R. 47), dated December 1, 1941. These findings were predicated upon evidence which we have summarized heretofore in our statement of case, wherein appropriate record references are given.

The essential findings upon which the Commission's order was predicated are scattered throughout the two reports of the Commission. (The findings in both reports except as the findings of the earlier report were modified or clarified by the later report, should be considered together. *Penn Anthracite Mining Co.* v. *D. & H. R. Corp. et al.*, 16 Fed. Supp. 732, 734.) As this Court recognized in *U. S.* v. *B. & O. R. Co.*, 293 U. S. 454, 465, the Commission is not called upon to make formal and precise findings of each and every fact. It is not necessary for the Commission to set out all of the evidence. Its findings must simply be "basic or essential." *Visceglia* v. *U. S.*, 24 Fed. Supp. 355, 357. See also *Manufacturers' Ry. Co.* v. *U. S.*, 246 U. S. 457, 487.

Differences between Court and Commission.

The most important difference between court and Commission was the conclusion of the court that since the physical carriage beyond the reshipping point

icago) was substantially the same for ex-barge, ex- and ex-lake grain, the ex-barge grain should not be uired to pay a greater charge for reshipping from cago than would ex-rail, or ex-lake grain. The court, n an examination of the record, found that little or grain moved into and out of Chicago in continuous ough movement, the inbound service coming to an by delivery of the grain into an elevator at Chicago, e commonly passing to a purchaser at that point, with outbound movement coming later as an independent nsaction (court's finding No. 3); found that the pur- se price at Chicago was on a delivered basis, the pper of the inbound movement assuming the trans- tation cost and reaping any saving therein (finding . 6), so that the outbound shipper would have no ing available to offset any difference in the out- nd factor (finding No. 18); found that any saving ributable to the inbound shippers would not enable m to undersell at the Chicago market (finding No.); considered the Commission's finding to the effect at the physical carriage beyond the reshipping point s substantially the same (finding No. 19); and noted at the inbound and outbound charges, barge-rail, were t factors of a through rate, all of which were on file th the Commission (findings Nos. 20 and 21). The urt then concluded that since the ex-barge grain would y a greater charge upon reshipment from Chicago for service which the court viewed as substantially the me service east from Chicago as accorded ex-rail and -lake grain (findings Nos. 24 and 19), such a situ- ion would result in less incentive than at present r a shipper to use barge service to Chicago (finding . 25), and that this would have an adverse effect on e grain producers enjoying barge transportation (find- g No. 26), and that such treatment would result in a llification of a consistent National Transportation

Policy to further the improvement of the Inland Waterways (finding No. 28). The court felt that the Commission took no evidence as to, and did not consider the effect of, such a situation with reference to Section 3(4) of the Act, as amended, and the National Transportation Policy (finding No. 31). The court concluded further that the action of the Commission was an attempt to bring about a cartelization of barge and rail transportation (finding No. 29).

From all of the above, the court reached its conclusion of law (No. 4) reading:

> "The order of the Interstate Commerce Commission discriminates against water competition by the users of barges."

In only one respect did the court consider that there was no evidence in the record to support the Commission, this being the comment by the court in the first sentence of its finding No. 18, reading:

> "There is no evidence in the record to support the finding of the Commission that the proposed schedules will not prohibit the movement by barge-rail, even to trunk-line territory."

It is clear that the court regarded the inbound movement as completely separate and distinct from the outbound movement, and in applying rates to outbound movement, separately considered, proposed that differences in rates should not be made to depend upon considerations pertaining to the inbound portion of the transportation. The court was concerned neither with origin areas, methods of transportation, nor charges connected with such inbound movements.

The Commission in its findings (Appendix 4) treated with this point in quite some detail, and we respectfully refer the Court to the Commission's findings, particu-

larly the statement in the final report (248 ICC 307 at 311), reading:

> "Protestants maintain that the proposed schedules will be unreasonable, unjustly discriminatory and unduly prejudicial against Chicago, the ex-barge traffic, shippers, elevator operators, and dealers interested in the ex-barge traffic, and the Federal Barge Lines as a connecting line, and unduly preferential in favor of other lake ports, ex-rail and ex-lake traffic and in favor of shippers, elevator operators and dealers interested in ex-rail and ex-lake traffic and respondents' connections by rail and lake. This is based primarily on the fact that under the proposed schedules the ex-barge rates will be higher than the ex-rail or ex-lake rates although in each instance the physical carriage beyond the reshipping point is substantially the same. But the latter is also true of local grain, grain brought in by truck, or by rail under intrastate rates, or grain which has forfeited its transit privileges. To adopt protestants' premise would mean that all proportional rates lower than local rates and differing from each other according to the origin of the commodity would have to be condemned. As pointed out by the division, reshipping or proportional rates are in their essence balances of through rates. Such balances are of course determined by the measure of the inbound and through rates and properly may vary according to the relative length and nature of the inbound and through service."

The court erroneously found that the breakdown in the rail rate structure referred to by the Commission related to the publication by western lines of low intrastate rates *to Chicago* (finding No. 23). As shown by the Commission's findings, and as we point out later herein, the Commission was concerned with the rate level within Official Territory and with the grain rate structure as it applied to movements therein and from other territories.

The court in finding No. 1 erred in its understanding of the application of the proportional rates from Chicago to the territory east of Central Territory. The court stated that such proportional rates apply to grain received over any route from any origin, whence the inbound interstate rates via rail are at least 8.5 cents. Note 20 (Appendix 1-a) provides that the proportional rates apply only when there are no joint through commodity rates in effect in connection with the inbound carrier via the reshipping point. It is shown by Exhibit 13, R. E. 60, introduced R. 237 that there are joint through commodity rates from the Illinois origins and that the so-called "specifics" from the Illinois origins to Chicago are unpublished (R. 248) portions of these one-factor through commodity rates (see also discussion of this matter in decision of Division 2, 246 ICC 353, 356). Further, a provision in Note 20 reads:

> "In no case shall the combination through rate to and from the reshipping point via rail be less than the local rate from the reshipping point to destination, etc."

While this furnishes a limitation pertaining to rail grain, it does not apply when the inbound movement is via water (see decision of Division 2, 246 ICC 353, bottom of 375).

In finding No. 15, the court stated that the Commission made no finding as to inbound barge rates on ex-barge grain from St. Louis and Kansas City, or as to the movement of such ex-barge grain. The Commission has held that the only issue in an Investigation and Suspension proceeding, which this was, is the lawfulness of the tariff schedules proposel. *Livestock to Eastern Destinations*, 156 ICC 498; *Freight Rates from Minneapolis*, 32 ICC 361, 367. In the decision of the entire Commission, page 311, the Commission stated:

> "It follows that the protestants' allegations cannot be sustained in this proceeding, although in a proper proceeding we might prescribe proportional rates on the ex-barge traffic lower than local rates or joint barge-rail rates lower than the combinations."

In a later section of our brief, we treat with the extent and nature of the Commission's jurisdiction over rail-and-water transportation as that jurisdiction existed prior and subsequent to the amendments of the Interstate Commerce Act, made September 18, 1940. We respectfully submit that a consideration of that material will show that, on this problem, the Commission in this proceeding could have done nothing further than to call attention to the fact that these matters could be considered and passed on in a proper proceeding.

We have here referred to all of the differences which do exist between Court and Commission. Hereinafter we show that the findings of the Commission above referred to were made with proper application of the law that the order fully met the proper tests to which it should have been subjected by the Court. We show also not only that the Court went beyond the proper limits of court review of orders of the Interstate Commerce Commission, substituting its judgment for that of the Commission in connection with regulation of interstate commerce, but also that, in so doing, the court drew conclusions from the evidence which were inconsistent with proper construction and application of the governing statute to the evidence, and which, in practical operation, would destroy the effectiveness of certain essential elements of rate structures built up by the Commission.

Proportional Rates Differing Among Themselves, and From Local Rates, Do Not, Ipso Facto, Cause Unjust Discrimination.

An important question raised by the Court's findings of fact supporting its conclusions of law has to do with the nature, construction and application of proportional rates. The Court found that little or no grain moves into and out of Chicago in continuous through movement, that the inbound service, whether by rail, barge or lake steamer, comes to an end by delivery of the grain into an elevator. The Court concluded, therefore, that the maintenance of varying levels of proportional rates for substantially the same service eastbound from Chicago, dependent for application upon circumstances affecting the movement of the grain inbound to Chicago, constituted undue discrimination in contravention of Section 2 of the Interstate Commerce Act (Appendix 2-e) (Title 49 U.S.C.A., Sec. 2).

That section prohibits any common carrier from charging any person a greater or less compensation for services rendered than it charges another:

> "* * * for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions."

Before varying rates for substantially the same transportation service may be deemed to be in contravention of this section, three things must appear:

(1) There must be a like and contemporaneous service;

(2) In the transportation of a like kind of traffic;

(3) Under substantially similar circumstances and conditions.

I. C. C. v. *B. & O. R. R. Co.*, 145 U. S. 263, 281.

All of the circumstances and conditions attendant upon the handling of the traffic, including prior or subsequent movements, must be considered to determine whether discrimination is unjust and therefore unlawful. *T. & P. Ry. Co.* v. *I. C. C.*, 162 U. S. 197; *I. C. C.* v. *B. & O. R. R. Co*, 145 U. S. 263, 281; *Clover Splint Coal Co., Inc.* v. *L. & N. R. Co.*, 197 ICC 276.

This Court has recognized that the service rendered in transporting local traffic between two points is not in law identical to the service rendered in transporting between the same points, through traffic which originates or terminates beyond, or which originates and terminates beyond. *Union Pac. Ry. Co.* v. *U. S.*, 117 U. S. 355, 363.

This Court has recognized that a proportional rate is necessarily part of a through rate and capable of use only as such. *Great Northern Ry. Co.* v. *Sullivan*, 294 U. S. 458, 460. See also *Hocking Valley Ry. Co.* v. *Lackawanna Coal and L. Co.*, 224 Fed. 930 at 931. In numerous decisions of the Commission, this principle has been recognized and followed. *Board of Trade of Kansas City, Mo.* v. *A. T. & S. F. Ry. Co.*, 69 ICC 185, 188; *Kansas City Transportation Bureau* v. *A. T. & S. F. Ry. Co.*, 16 ICC 195, 201; *Frederichsen Floor & Wall Tile Co.* v. *A. C. L. R. Co.*, 146 ICC 786, 791; *Morrel & Co.* v. *N. Y. C. R. Co.*, 104 ICC 104, 128; *Cairo Board of Trade* v. *C. C. C. & St. L. Ry. Co.*, 46 ICC 343, 348.

Since the movement of through traffic between two points is not the movement of like traffic under substantially similar circumstances and conditions as the movement of local traffic between the same two points, and since the rates for the movement of such through traffic, proportional rates, are necessarily parts of through rates capable of use only as such, it is clear that proportional rates may differ from the local rates on the same traffic

between the same points, without creating the unjust discrimination prohibited by Section 2. This is true even though part of the total transportation is by carriers not subject to the jurisdiction of the Commission. This Court has so held.

In *Texas & Pac. Ry. Co.* v. *I. C. C.*, 162 U. S. 197, a proceeding wherein an order of the Interstate Commerce Commission was assailed, this Court had occasion to determine whether it was lawful to provide rates for application on export and import traffic which were lower than the rates for application on domestic traffic moving between the same points. The Commission had found that since it did not have jurisdiction over the movements of the export and import traffic beyond the ports, or the charges therefor, it could not consider the circumstances and conditions of such movements beyond the ports to distinguish the movements of such traffic for the hauls within its jurisdiction from the movements of domestic traffic for the same hauls within its jurisdiction. This Court held that the Commission had erred in failing to consider the differentiating circumstances and conditions, even though they related to portions of the through transportation over which the Commission had no jurisdiction, and concluded that because of the existence of such different circumstances and conditions affecting the movement of export and import traffic, the provision of rates on such traffic at variance from the local rates on domestic traffic between the same points did not create undue discrimination.

In *News Syndicate Co.* v. *N. Y. C. R. R. Co.*, 275 U. S. 179, and *Great Northern Ry. Co.* v. *Sullivan*, 294 U. S. 458, this Court considered orders of the Commission awarding reparation on shipments moving from points in Canada to points in the United States. In the former case, the traffic had moved on single factor joint through

rates. The American carriers had not established proportional rates from the border to destinations in the United States. The Commission found that the complainants had been damaged by the failure of the American carriers to establish proportional rates and by the exaction of excessive through charges, and awarded reparation measured by the extent of the unreasonableness of the through charges. This Court held that even though the Commission did not have jurisdiction over the portions of the hauls within Canada or over the rates therefor, it did have jurisdiction to determine whether the complainants had been damaged and, having so found, to measure the damage by the extent of unreasonableness of the through charges. In the later case, proportional rates from the border had been published and the traffic had moved thereon. The complaint had assailed these proportional rates only. The Commission found the assailed rates unreasonable and awarded reparation without finding specifically that the through charges based upon the unreasonable proportional rates from the border and proportional rates from the Canadian origins to the border were excessive. This Court stated (page 460) that "each proportional rate necessarily was a part of the through rate and was capable of use only as such," and held that, despite the unreasonableness of the proportional rates, the award of reparation was improper in the absence of a finding that the combinations of the assailed proportional rates and the Canadion proportional rates were unreasonable. In other words, the lawfulness of charges for transportation subject to the jurisdiction of the Commission which is but part of total transportation must be determined by consideration of the factors, including the total charges, affecting the total transportation.

In many cases the Commission has been called upon to prescribe or approve rail rates in the nature of pro-

portional rates for application on traffic moving beyond by carriers not subject to its jurisdiction. In all of these cases, even though it was only prescribing or approving and even though it had jurisdiction only to prescribe or approve, rates for the rail segments of the total transportation, the Commission considered all of the circumstances and conditions surrounding the total movements and found that such circumstances and conditions alone distinguished such traffic from other traffic moving between the same points over the same rail segments. *Central Pennsylvania Coal Producers' Asso.* v. *B. & O. R. Co.*, 196 ICC 203, 235; *Rates on Bunker Coal*, 73 ICC 62, 75; *Sand, Gravel & Crushed Stone to Southern Illinois*, 160 ICC 507, 524; *Ex-lake Iron Ore from Chicago to Granite City*, 120 ICC 75, 78, s.c. 123 ICC 503; *Maritime Association of Boston* v. *A. A. R.*, 95 ICC 539, 572; *Bituminous Coal to Youngstown*, 197 ICC 617, 625; *Lumber from San Francisco Bay Points When From Beyond*, 78 ICC 760, 766-767; *Washington Coal Producers' Asso.* v. *U. P. R. R. Co.*, 129 ICC 499, 500; *Alan Wood Steel Co.* v. *Alabama G. S. R. Co.*, 190 ICC 3, 10; *Buffalo Grain Case*, 46 ICC 570; *Universal Atlas Cement Co.* v. *Wabash Ry. Co.*, 210 ICC 494, 495; *Beaver Portland Cement Co.* v. *California Central R. Co.*, 200 ICC 691. In several of these cases, particularly *Lumber from San Francisco Bay, supra*, and *Alan Wood Steel Co., supra*, the water carriers were not even common carriers.

In other words, to determine the lawfulness of proportional rates, consideration must be afforded to all of the circumstances and conditions affecting the through movement of the traffic, circumstances and conditions which attach inescapably to proportional rates, irrespective of whether or not all parts of the total movement are subject to the jurisdiction of the Commission; such determination may not be limited to consideration only

of the character of the physical transportation between the points between which the proportional rates apply.

Several years ago, an issue similar in many respects to the one here presented, was before the Commission in *Ex-River Grain from St. Louis to the South*, 203 ICC 385. That case concerned the lawfulness of schedules published by rail carriers operating from Mississippi River ports and gateways to the South restricting the application of their proportional rates on grain so as not to apply on ex-barge traffic. In approving the schedules as not unlawful, the Commission pointed out that, while there was no substantial difference between the transportation services performed on the ex-river traffic and on ex-rail traffic from the same gateway river ports, "the service in the transportation of ex-rail and ex-river traffic is not under substantially similar circumstances and conditions." The only material distinction between the situation presented in that case and the situation here presented, is that in that case the proportional rates from the gateway river ports did not vary dependent upon the origin of the traffic.

Since proportional rates are but factors of through rates, since the lawfulness of proportional rates must be determined by the circumstances and conditions affecting the through transportation, and since proportional rates may properly differ from rates for local transportation between the same points, it follows inevitably that proportional rates between the same points themselves may vary, dependent upon variations in the circumstances and conditions affecting the through transportation to which they apply.

The Commission has considered proportional rates which varied in amount dependent upon the origin of the traffic and consistently has held that such rates were not unlawful. *Export Rates on Grain and Grain Products*, 31 ICC 616, 619, and earlier cases there cited;

Southern Kansas Asso. v. *C. R. I. & P. Ry. Co.*, 139 ICC 641, 672; *Central Pennsylvania Producers' Coal Asso.* v. *B. & O.*, 196 ICC 203.

In *Southwestern Millers' League* v. *A. T. & S. F. Ry. Co.*, 225 ICC 195, the Commission prescribed proportional rates from Chicago to Central Territory on grain from the Northwest which differed from the proportional rates prescribed from the same gateway to the same common destinations on grain from Trans-Mississippi River Territory. These varying proportional rates for substantially the same transportation service were prescribed in order to work out proper through charges from the two origin areas to this common destination area, and were proper because of differences in circumstances and conditions surrounding the inbound movements.

Likewise, the circumstances and conditions—the origin of the traffic, its method of carriage to Chicago, the charges for such carriage, and the extent of the service—surrounding the transportation of grain originating at points in Illinois and moving to Chicago by barge via the Illinois Waterways are quite different from the circumstances and conditions surrounding the transportation of grain originating in the Northwest or in Trans-Mississippi River Territory or originating in Illinois and moving to Chicago by other forms of transportation; consequently the circumstances and conditions surrounding the total transportation via Chicago to destinations east thereof are dissimilar even though the part of the transportation beyond Chicago may be substantially the same. Therefore, the provision of different rates for substantially the same transportation service east from Chicago dependent upon the origin of the traffic and the other circumstances surrounding its movement to Chicago does not contravene the provisions of Section 2.

No clearer statement of the lawfulness under Section 2 of the Act of proportional rates for substantially the same transportation service, varying in accordance with differences in the circumstances and conditions affecting the transportation beyond, will be found, than in the report of the Interstate Commerce Commission in *Central Pennsylvania Coal Producers' Asso.* v. *B. & O. R. Co.*, 196 ICC 203,* which concerned the lawfulness of varying levels of trans-shipment rates on bituminous coal from mines to ports on the eastern seaboard. We quote at length from page 235 of the Commission's report:

> "Except as to traffic to nonadjacent foreign countries, the operators allege that the maintenance to ports of Philadelphia and Baltimore of trans-shipment rates which are different for inside-the-capes than for outside-the-capes traffic, contravenes the provisions of section 2 of the Act. As previously stated, the rail service rendered all transshipment coal is substantially the same. The coal, which is charged the outside-the-capes rates, other than that which is exported, usually moves to New York Harbor or to New England, and that charged the higher inside-the-capes rates generally moves a relatively short distance by water to points within the respective harbors. Transshipment rates, like proportional rates, may vary between the same points so as to reflect, to some extent, the proportion of the through charges that the service rendered thereunder is of the entire transportation service performed. We have found on various occasions that proportional rates which vary in amounts depending on the origins or destinations are not unlawful because of that fact. *Southern Kansas Grain Asso.* v. *C. R. I. & P. Ry. Co.*, 139 ICC 641. Transshipment rates are also similar to export rates in that we have no jurisdiction over the transpor-

* In a subsequent report, *State of New Hampshire* v. *B. & O. R. R. Co.*, 201 I. C. C. 445, certain of the prior findings relative to another phase of the litigation, the all-rail rates to New Hampshire, were modified.

tation which takes place beyond the transshipment piers. We have found that the maintenance of different export rates from the same origin to the same port, dependent upon the foreign destination, is not unlawful. *Western Export Iron and Steel Case,* 43 ICC 129. In *Detroit* v. *C. & O. Ry. Co.,* 77 ICC 98, division 1 found, among other things, that a rate on coal from mines in West Virginia to Toledo, for transshipment to Detroit, Mich., which was higher than on coal destined to certain west-bank Lake Michigan and Lake Superior ports, was not unjustly discriminatory. It is significant that transshipment rates to the ports of Philadelphia and Baltimore, varying according to whether the destination of the traffic was within or beyond the capes, have been maintained for over a quarter of a century without complaint under section 2 of the act, although they have been assailed under other sections of the act by various interests, including these complainants. The latter, in the Eastern Bituminous Coal case, sought outside-the-capes rates that would have widened the spread under the inside-the-capes rates that then existed and still exist. Upon the facts of record we are of the view that the transshipment rates assailed are not unjustly discriminatory."

Appellants respectfully submit that the court below failed to recognize these principles governing the operation of Section 2 insofar as proportional rates are concerned when it treated the proportional rates from Chicago to Central Territory and to the East as rates for separate and distinct transportation services from Chicago unrelated to the transportation serviced inbound to Chicago. Appellants submit further that the assailed order of the Commission enjoined by the court below was based upon a recognition and proper application of these principles and, therefore, that the said order was not arbitrary or in excess of the statutory power of the Commission and should not have been enjoined.

Interstate Commerce Commission Properly Construed and Applied the Interstate Commerce Act as Amended September 18, 1940.

y legislation enacted September 18, 1940, the Inter-e Commerce Act was amended in several respects. icularly by a congressional declaration of national sportation policy and by modifications of Section 3. barge lines contend that the Interstate Commerce as thus amended, affords them a right to maintain action, and that the assailed order of the Inter-e Commerce Commission should be enjoined because as predicated upon evidence all of which was taken r to the enactment of these amendments, and because effect of the order contravenes these provisions of act, particularly Section 3(4).

'e submit that these contenions are unsound and that court below erred in accepting them as valid and predicating thereon, in part at least, its decree en-ing and setting aside the assailed order of the Com-sion.

n analysis of the amendments and of the practical nges which they effected in the provisions of the In-tate Commerce Act, will indicate clearly that so far the contentions of the barge lines are concerned. amendments in practical effect did nothing more n restate and set up in somewhat different order visions which had been in effect for many years r thereto.

he Panama Canal Act, enacted August 24, 1912 (c. Sec. 11, 37 Stat. 568), empowered the Commission egulate the transportation of property from point oint in the United States by rail and water through Panama Canal or otherwise, when the transportation by common carriers, to require the establishment

of physical connections between such rail and water carriers, to establish through routes and joint rates between such carriers, and to determine all the terms and conditions under which such carriers should be operated in the handling of such traffic. By the Panama Canal Act, the Commission also was given authority to establish proportional rates by rail to or from the port and to determine to what traffic and in connection with what vessels and upon what terms and conditions such proportional rates should apply, and proportional rates were therein defined as:

> "By proportional rates are meant those which differ from the corresponding local rates to or from the port and which apply only to traffic which has been brought to the port or is carried from the port by a common carrier by water."

The empowering provisions of the Panama Canal Act were subsequently included as Section 6(13) of the Interstate Commerce Act (c. 91, Secs. 409, 412, 413, 41 Stat. 383; Title 49 U.S.C.A., Sec. 6(13)). We carry as Appendix 2-h Section 6(13) as it read prior to the amendments of 1940.

The amendments enacted September 18, 1940, modified Section 6(13), derived from the Panama Canal Act. The effect of these amendments, however, was merely to transfer the substance of the material in Section 6(13) (b) to Section 1(4) of the Interstate Commerce Act, to transfer the substance of sub-paragraph (d) to Section 6(12), and to renumber the remainder. We carry as Appendix 2-i this section which became 6(11) as amended, and as Appendix 2-c, Section 1(4) of the Act as it read before and as Appendix 2(d) the paragraph as amended.

June 3, 1924, the Inland Waterways Corporation Act was passed (c. 243, Secs. 1 to 6, 43 Stat. 360). This

enactment is carried in Title 49, U.S.C.A., Sections 151 to 156, inclusive. Among other things, this Act (as amended 45 Stat. 980) provided for the certificating of common carriers by water who desired to participate with rail carriers in through routes and joint rail-and-water rates, empowered the Commission to require the establishment of through routes and joint rates between certificated water carriers and railroads, provided that the Commission should prescribe such reasonable differentials between all-rail rates and joint rail-and-water rates as it found justified, and further empowered the Commission to fix divisions of such rail-and-water rates. These various provisions were contained in Section 3(e) of that Act. We carry as Appendix 2-r, Section 3(e), as it read prior to September 18, 1940.

The amendments of September 18, 1940, repealed Section 3(e) of this Act, but carried the substance of this paragraph in amendments to the Interstate Commerce Act effected concurrently. Said repealing act contained the following proviso (c. 722, Title 2, Sec. 201, 54 Stat. 950; Title 49 U.S.C.A., Sec. 153):

> "Provided, however, that (1) any certificate of public convenience and necessity granted to any carrier pursuant to the provisions of such sub-section (e) shall continue in effect as though issued under the provisions of Section 309 of the Interstate Commerce Act (909 of this Title), as amended; and (2) through routes and joint rates, and rules, regulations, and practices relating thereto, put into effect pursuant to the provisions of such sub-section (e) shall, after the repeal of such sub-section (e), be held and considered to have been put into effect pursuant to the provisions of the Interstate Commerce Act (Chapters 1, 8 and 12 of this Title), as amended."

The provisions requiring the procurement of certificates of public convenience and necessity by water carriers, as modified in a manner not here important, are carried in Section 309(a) of the Interstate Commerce Act (U. S. Code, Title 49, Sec. 909). The provisions for through routes and joint rates with reasonable rules, regulations and practices were transferred to Section 1(4) and Section 305(b) (U. S. Code, Title 49, Secs. 1(4) and 905). The requirement that the Commission should fix reasonable differentials between the all-rail rates and the joint rates in connection with said water service was carried into Section 307(d) (U. S. Code, Title 49, Sec. 907(d)). The Commission's authority over divisions of the joint water-rail rates is now provided in Section 15(6) (U. S. Code, Title 49, Sec. 15) and Section 307(e) (U. S. Code, Title 49, Sec. 907(e)).

Following the enactment of the Inland Waterways Corporation Act, the Interstate Commerce Commission instituted an investigation, *Procedure under Barge Line Act*, 148 ICC 129, to determine just what its procedure should be under that Act. In that case the Interstate Commerce Commission carefully considered the extent of its authority over through rail-and-water routes prior and subsequent to the adoption of that Act. In *C. R. I. & P. Ry. Co.* v. *U. S.*, 274 U. S. 29, this court reviewed the extent of the jurisdiction of the Interstate Commerce Commission over rail-and-water routes as that jurisdiction had existed for some time prior to the amendments of September 18, 1940. These cases make it clear that the Commission, prior to September 18, 1940, had plenary powers in connection with any through rail-and-water routes.

Following the Commission's decision in *Procedure under Barge Line Act, supra,* various applications for through routes and joint differential rates were made by

the Inland Waterways Corporation and considered by the Commission in Ex Parte 96.* Other privately owned barge lines also filed similar applications.**

In these proceedings the Commission gave very careful consideration to the question of the reasonableness of the proposed through routes, including the circuity thereof, and to the further question whether such through routes would be in the public interest. The Commission stated very definitely that the establishment of such through rail-and-water routes would be required only when they were shown to be necessary or desirable in the public interest (see 153 ICC 129, at 133).

When the provisions of the Inland Waterways Corporation Act were incorporated into the Interstate Commerce Act by the amendments of September 18th, 1940, the test of what through routes should be established remained the same (see Sec. 1(4), as amended, Sec. 305(b), Sec. 15(3) and Sec. 307(d)).

So far as water carriers were concerned, the effect of the amendments of September 18, 1940, was to subject their independent operations, wholly by water, theretofore specifically excluded from regulation by Section 15(3) of the Act, to regulation by the Commission. The amendments did not alter materially the jurisdiction which the Commission long had enjoyed over the operation of water carriers when participating in through routes with rail carriers. The amendments did not, as the barge lines seemingly contend and as the court below inferred, appreciably change the existing provisions governing the establishment and regulation of

* These applications of the Inland Waterways Corporation are passed on in: 153 ICC 129, 156 ICC 141, 161 ICC 207, 163 ICC 716, 167 ICC 385, 172 ICC 525, 174 ICC 477, 181 ICC 675, 192 ICC 173, and 192 ICC 663.

** The applications of Mississippi Valley Barge Line Co. were considered by the Commission in Ex Parte 99, the first report being carried in 167 ICC 41. Applications of the American Barge Line were considered in Ex Parte 102, the first report being carried in 182 ICC 521.

through routes between rail and water carriers and of the joint or proportional rates applicable thereto, nor did the amendments cause the creation of new through routes.

We now consider the question whether there were, in fact, through routes between the barge lines operating on the Illinois Waterways to Chicago and the rail carriers operating east from Chicago, for the through movement of Illinois grain by barge to Chicago and rail beyond, for, as thereafter will be shown, the provisions of the statute upon which the barge lines here seek to rely, as effective prior and subsequent to September 18, 1940, have no application unless such through routes do, in fact, exist.

What Is a Through Route.

A through route has been defined by this Court as follows (see *St. L. S. W. Ry. Co.* v. *U. S.*, 245 U. S. 136, at the bottom of page 139):

> "A through route is an arrangement, express or implied, between connecting railroads for the continuous carriage of goods from the originating point on the line of one carrier to destination on the line of another. Through carriage implies a 'through rate.' This 'through rate' is not necessarily a 'joint rate.' It may be merely an aggregation of separate rates fixed independently by the several carriers forming the 'through route'; as where the 'through rate' is 'the sum of the locals' on the several connecting lines or is the sum of lower rates otherwise separately established by them for through transportation. * * * But even where the through route and through rates are matters of express agreement between the carriers, a continuous 'joint rate' does not always extend from the point of origin to point of destination. There may be, on the 'through route' an intermediate point at which, in common railroad practice, the rate 'breaks.' That is,

> the 'joint rate' from the point of origin ends at this 'rate-breaking point,' and there is charged for the distance beyond the same local rate or joint rate that would have been charged had the business originated at this intermediate point. That is, instead of a 'joint through rate,' there is a 'combination.' "

The Supreme Court in *Great Northern Ry. Co.* v. *Sullivan,* 294 U. S. 458, states at page 460:

> "Combination rates (the sum of proportional rates—see p. 459) necessarily reflect agreement, express or implied, between the connecting carriers to establish a through route for continuous carriage from origin on one to destination on the other."

A carrier cannot be considered a "connecting carrier" merely because its operations extend up to a certain point beyond which we find the lines of many other carriers. Something more than mere propinquity is necessary. To demonstrate that the physical situation does not determine the question of what is or is not a "connecting carrier" we refer to *Augusta S. R. Co.* v. *Wrightsville & T. R. Co.,* 74 Fed. 522, in which case it is shown that the carriers did have an arrangement for a through route and were connecting carriers, although they had no physical connection. In *C. I. & L. Ry. Co.* v. *U. S.,* 270 U. S. 287, the Supreme Court, at page 293, states:

> "Direct physical connection with the carrier subjected to prejudice is not essential."

There Are No Through Routes Between the Barge Lines and the Rail Carriers.

During the course of the hearings before the Commission, witnesses representing the Mechling Barge Lines (R. 985) and the Inland Waterways Corporation (R. 1225) freely admitted that these barge lines had no arrangements with rail carriers for through routes on

grain transported by their barges to Chicago and thence east by rail. In its complaint filed in the court below, the Inland Waterways Corporation averred (Sec. 10, page 5) (R. 5), that in the course of its business it transported grain to Chicago via barge, and stated:

> "said interstate transportation is conducted on a port-to-port basis without any common arrangement with carriers beyond Chicago for through transportation."

A Through Route Must Exist Before We May Have "Connecting Lines" Under Section 3(4).

The appellee barge lines contend that the Commission acted arbitrarily and exceeded its statutory power in failing to make a specific finding regarding the application of Section 3(4) as amended September 18, 1940, to the schedules in controversy. This section, as thus amended, reads as follows:

> "(4) All carriers subject to the provisions of this chapter shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines and connecting lines, and for the receiving, forwarding, and delivering of passengers or property to and from connecting lines and shall not discriminate in their rates, fares and charges between connecting lines, or unduly prejudice any connecting line in the distribution of traffic that is not specifically routed by the shipper. As used in this paragraph the term 'connecting line' means the connecting line of any carrier subject to the provisions of this chapter or any common carrier by water subject to chapter 12 of this title."

The amendment merely renumbered a section which had been carried theretofore for many years as Section 3(3) of the Interstate Commerce Act and added a sentence—the last sentence above quoted—defining the term "connecting line."

This section requires all carriers, subject to the provisions of the Act, to:

> "1. afford all reasonable, proper and equal facilities for the interchange of traffic between their respective lines and connecting lines, and for the receiving, forwarding, and delivering of passengers or property to and from connecting lines;
>
> "2. not discriminate in their rates, fares and charges between connecting lines; and
>
> "3. not unduly prejudice any connecting line in the distribution of traffic that is not specifically routed by the shipper."

It is to be noted particularly that the provisions of this section apply only to "connecting lines." Before carriers may be termed "connecting lines," they must join in "through routes" for the through movement of traffic over their respective lines. This was made clear by the Commission in *Investigation of Seatrain Lines, Inc.*, 206 ICC 328, where consideration was given to the application of the section prior to the amendment of 1940 to a situation where rail carriers had refused to furnish facilities for the interchange of traffic (in this instance, the interchange of freight cars) with a water carrier equal to the facilities which they furnished for the interchange of traffic with other rail carriers. The Commission specifically found (page 343) that there was nothing in this or in any other section of the act which imposed any duty upon the Commission, or gave that body any authority, to require facilities for the interchange of traffic between rail and water carriers equal to the facilities maintained for the interchange of traffic between the same rail carriers and other rail carriers *where through routes between such rail and water carriers do not exist.* In a subsequent decision in the same case (237 ICC 97, 101), the Commission found upon new

evidence that through routes between the rail and water carriers in fact did exist, and because of this finding, and only because of it, the Commission then concluded that it had jurisdiction to require, and did require, the establishment of equal facilities for interchange.

The duty to furnish equal facilities for interchange with connecting lines, the duty not to discriminate in rates between connecting lines, and the duty not to prejudice connecting lines in the distribution of unrouted traffic, are all set out in this same section, and are equal rights of "connecting lines." This case of Seatrain Lines makes it clear that before we consider the performance of the duty, we must have a "connecting line" and that a "connecting line" cannot exist until there is shown to be a through route. This case makes it clear also that, where through routes existed, the Commission had the power and was required, prior to the amendments of September 18, 1940, under the section then designated as 3(3), to prevent discrimination, preference and prejudice between connecting rail and water carriers.

In the first decision of the Commission in the present case, this point was recognized. In 246 ICC 353, at page 357, it was found that the Mechling Barge Line had no agreement with respondents with respect to the shipment of grain beyond Chicago, and at page 363, it was found that the Federal Barge Line (Inland Waterways Corporation) had no arrangement with respondents for a through route. It was also found at page 380:

> "To now conclude that the suspended schedule should be found not justified would, in effect, be recognizing a common arrangement between the barge lines and the rail carriers for a continuous through route, despite the fact that the evidence definitely shows none exists. A common arrangement cannot be inferred."

Section 3(1) of the Interstate Commerce Act (Title 49 U.S.C.A., Sec. 3, Par. 1) prohibits undue or unreasonable preference and prejudice. This section was amended September 18, 1940, by the addition of a clause providing specifically:

> "that this paragraph shall not be construed to apply to discrimination, prejudice, or disadvantage to the traffic of any other carrier of whatever description."

The barge lines as carriers cannot invoke the provisions of this section in any respect whatsoever. In its initial report, at page 363, the Commission so found. Nor can these barge lines invoke the provisions of Section 3(4) governing the matter of preference, prejudice, and discrimination between carriers because that section has application only where there are "connecting lines," *i.e.*, where through routes have been established. The barge lines have no through routes with the rail carriers for the transportation of this grain traffic, and, therefore, are not "connecting lines."

The barge lines may contend that Congress intended that Section 3(4) should operate to prevent preference, prejudice, or discrimination against any and all carriers because Congress specifically excluded all carriers from the protection afforded by Section 3(1). Such a broad construction of Section 3(4) necessarily would make all carriers "connecting lines," and that would be tantamount to the creation of all conceivable through routes. But other provisions of the statutes (Secs. 1(4), 305(b), 15(3) and 307(d)) require the establishment only of those through routes between rail and water carriers which are found by the Interstate Commerce Commission to be just and reasonable and in the public interest. Surely Section 3(4) should not be so construed as to nullify these other provisions of the statute.

Since the provisions of Section 3(1) do not apply to carriers, and since the provisions of Section 3(4) do not apply to carriers other than "connecting lines," in which category the barge lines may not be classified, the barge lines could not invoke the provisions of this section to indicate before the Commission any unlawfulness in the schedules in controversy, and could not invoke the provisions of this section as a ground for their action against the order of the Commission. Since the section had no application, the Commission had no occasion to take any evidence regarding the issue sought to be raised by the barge lines under this section after the amendment of September 18, 1940, nor, as a matter of law, was it necessary for the Commission specifically to make a negative finding that the provisions of Section 3(4) did not govern the determination of the issues properly before the Commission.

We submit that, with respect to Section 3(4), the Commission did not exceed its statutory power or act arbitrarily in refusing to grant a further hearing after the amendments of September 18, 1940, became effective, and did not err as a matter of law in concluding in effect that the issues before it were not governed by Section 3(4). We further submit that the court below erred in failing to recognize that the provisions of this section could not properly be invoked in this litigation.

By this argument we do not contend that there is any lawfulness or impropriety inherent in the establishment and maintenance by rail carriers of proportional rates or of rates in the nature of proportional rates for application on traffic originating or terminating beyond the limits of the rail hauls but not moving via through routes. *Lake Cargo Coal Rates, 1925,* 126 ICC 313-314. Our only point here is that, in the absence of through routes, the lawfulness of such rates may not be determined by consideration of Section 3(4).

In addition to misconstruing the application of Sections 2 and 3 to the rate problem presented by this litigation, the court below erred in concluding that operation of the schedules in controversy would contravene the National Transportation Policy.

The National Transportation Policy Was Effectuated.

In the statement of the National Transportation Policy adopted September 18, 1940 (Title 49 U.S.C.A., preceding Section 1, carrier herein as Appendix 2-a), it is declared to be the policy of Congress:

1. to provide for fair and impartial regulation of all modes of transportation;
2. so administered as to recognize and preserve the inherent advantages of each;
3. to promote safe, adequate, economical and efficient service and foster sound economical conditions in transportation and among the several carriers;
4. to encourage the establishment and maintenance of reasonable charges without unjust discrimination, undue preferences or advantages, or unfair or destructive competitive practices.

The above factors were to be given consideration in order that a result be brought about, and that result was stated in this same section to be:

> "developing, coordinating, and preserving a national transportation system by water, highway and rail * * * adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense."

The provisions of the National Transportation Policy, insofar as they pertained to rail-and-water transportation, are in effect substantially the same as the provisions of a prior statement enacted as Section 500 of the Transportation Act, 1920 (U. S. Code Title 49, Sec. 142—

February 28, 1920, c. 91, Sec. 500, 41 Stat. 499). We carry this section as Appendix 2-b.

The first paragraph of this section provided:

> "It is hereby declared to be the policy of Congress to promote, encourage, and develop water transportation, service and facilities in connection with the commerce of the United States, and to foster and preserve in full vigor both rail and water transportation."

The assailed order of the Commission was entered with full comprehension and consideration of the congressional declaration of national transportation policy, and was entered with due consideration of the rights of the rail carriers and the water carriers, parties to this litigation.

That the order did not conform to the position of the barge lines, and that it might operate to the detriment of the barge lines' competitive position in the transportation of grain to Chicago, does not brand the order as in contravention of the National Transportation Policy, for this Court in construing the prior enactment, Section 500 of the Transportation Act, 1920, in *Mississippi Valley Barge Line Co.* v. *U. S.*, 292 U. S. 282, stated clearly at page 288:

> "The admonition does not mean that carriers by rail shall be required to maintain a rate that is too high for fear that through the change they may cut into the profits of carriers by water. The most that it can mean, unless, conceivably, in circumstances of wanton or malicious injury, is that where carriers by land and water are brought within the range of the regulatory powers of the Commission, as, *e.g.*, in establishing through routes or joint rates, there shall be impartial recognition and promotion of the interests of all."

As heretofore shown, the Interstate Commerce Commission had prior to September 18, 1940 (by portions

of the Panama Canal Act and the Inland Waterways Corporation Act), plenary powers in connection with through rail-and-water routes. As also shown heretofore, the amendments of September 18, 1940, did, in connection with the powers concerning such through routes, but result in rearrangement of the material and its inclusion in sections of the Interstate Commerce Act. There were provisions effective prior to September 18, 1940, under which rail-and-water transportation might be differentiated from all-rail transportation and the rates, rules, regulations and/or practices of these two kinds of transportation distinguished. The Commission had authority (under Sec. 3(e) of the Inland Waterways Corporation Act which was, by the amendment of 1940, transferred into Section 307(d) of the Interstate Commerce Act), to prescribe reasonable differentials between all-rail rates and joint water-rail rates. The Commission had authority (under Sec. 6(13)(c) of the Act prior to the amendments of September 18, 1940) to prescribe proportional rates by rail to or from the port and to determine to just what traffic and upon what terms and conditions such proportional rates shall apply, the definition of such proportional rates being therein stated as:

> "By proportional rates are meant those which differ from the corresponding local rates to or from the port and which apply only to traffic which has been brought to a port or is carried from the port by a common carrier by water."

This power was continued under Section 6(11)(b) of the Act.

In Section 305(c) (Title 49 U.S.C.A., 905(c), carried as Appendix 2-p), it was made unlawful for common carriers by water to cause any undue or unreasonable preference or prejudice, this section further specifically providing:

> "Differences in the classifications, rates, fares, charges, rules, regulations and practices of a water carrier in respect of water transportation from those in effect by a rail carrier with respect to rail transportation, shall not be deemed to constitute unjust discrimination, prejudice or disadvantage, or an unfair or destructive competitive practice, within the meaning of any provisions of this act."

The Act, therefore, by its own provisions prior to September 18, 1940, clearly conferred powers upon the Commission under which rail-and-water transportation would be differentiated from all-rail transportation. All of these provisions were continued by the amendments with the addition of language adopted at the same time (Sec. 305(c) above), which clearly shows that Congress itself recognized that rates, fares, charges, rules, regulations and practices, might differ as between water and rail transportation.

Among other amendments made in 1940, was an amendment to Section 15(a) of the Act (Title 49 U.S. C.A., Sec. 15a) which changed paragraph 2 from:

> "In the exercise of its power to prescribe just and reasonable rates, the Commission shall give due consideration, among other factors, to the effect of rates on the movement of traffic; to the need, in the public interest, of adequate and efficient railway transportation service at the lowest cost consistent with the furnishing of such service; and to the need of revenues sufficient to enable the carriers, under honest, economical, and efficient management, to provide such service."

so that it reads, as follows:

> "In the exercise of its power to prescribe just and reasonable rates, the Commission shall give due consideration, among other factors, to the effect of rates on the movement of traffic *by the carrier or carriers for which the rates are prescribed;* to the

need, in the public interest, of adequate and efficient railway transportation service at the lowest cost consistent with the furnishing of such service; and to the need of revenues sufficient to enable the carriers, under honest, economical, and efficient management, to provide such service."

This particular amendment to Section 15(a) has been considered by the Interstate Commerce Commission in *Seatrain Lines, Inc.* v. *A. C. & Y. Ry. Co.*, 243 ICC 199. At 214, the Commission states:

> "In connection with these contentions it is of interest that the rule of rate making in section 15a has been recently amended so as to require us, in the exercise of our authority to prescribe just and reasonable rates, to 'give due consideration, among other factors, to the effect of rates upon the movement of traffic *by the carrier or carriers for which the rates are prescribed* * * *.' This admonition is repeated in sections 216(i) and 307(f), containing rules for rate making relating to motor and water carriers, respectively. The words which have been italicized for emphasis are of particular interest. They were not in either of the bills originaliy passed by the Senate and the House of Representatives but were added by the committee of conference. Their meaning, supported also by the legislative history, seems to be that no carrier should be required to maintain rates which would be unreasonable, judged by other standards, for the purpose of protecting the traffic of a competitor."

The motor carriers have been under the jurisdiction of the Commission since 1935. The Commission has recognized that its duty in connection with the relationship between the rail and motor carriers has been "a paramount duty laid upon us to regulate both transportation agencies, not in the interest of the one or the other of such agencies, but in the public interest." See *Naval Stores from Miss. to Gulf Ports*, 235 ICC 723, at 733. In

this *Naval Stores* case, the Commission also states, at page 733:

> "Healthy competition between different agencies of transportation is undoubtedly in the public interest. Ordinarily, either may initiate rates that will, in the opinion of its management, enable it to obtain or retain desired traffic provided that such rates are compensatory."

The National Transportation Policy must be interpreted in a manner which would permit of the Commission making effective the various provisions of the act as it now reads which, as pointed out, does address itself to a situation in which rail transportation might be handled under practices differing from those pertaining to water transportation and in which through water-rail transportation may be properly functioning under practices differing from all-rail transportation.

It should be evident from the information heretofore set forth in the statement of the case, and it will be more fully developed hereinafter, that the continued application of the ex-Northwest proportional rates to Central Territory and of the proportional rates to the East on ex-barge grain seriously disturbed the existing grain rate structure throughout Official Territory, a structure, in large measure at least, prescribed by the Commission. From the statement of the National Transportation Policy itself and from the decisions of this Court and of the Commission construing that congressional declaration of policy, it is obvious that the protection of the competitive position of these water carriers in the transportation of grain to Chicago, is not necessarily paramount from the standpoint of national transportation policy to the protection of an extensive rate adjustment on important traffic. Unquestionably, the Commission recognized this and accorded due con-

sideration to the National Transportation Policy when it entered the assailed order. We submit that the court below, on the contrary, took a narrow view of this policy quite inconsistent with its intent, purpose and construction and that thereby the court below clearly erred.

The Commission Properly Considered the Carriers' Proposals in Relation to the Grain Rate Structure.

The proportional rates east of the gateways to destinations in Central Territory, which we are here considering, were prescribed by the Interstate Commerce Commission in *Southwestern Millers' League* v. *A. T. & S. F. Ry. Co.*, 225 ICC 195. The Commission was there fixing a proper level of proportional rates for those portions of the movements east of Chicago and the other gateways to Official Territory. It was recognized that transportation east of Chicago on grain which originated in the Northwest, and on grain which originated in Trans-Mississippi River Territory was substantially the same. But it was found that the proportional rate levels east of Chicago, and the other gateways, must necessarily vary as between ex-Northwest and ex-Trans-Mississippi River grain, in order to equalize the through charges. The Commission did require equalization of the through charges, requiring further a continuation of the gateway equalization. This arrangement made absolutely necessary the setting up of varying levels of proportional rates east of these gateways for that similar movement from the gateway to any destination in Central Territory.

Necessarily, the Commission was forced to consider the factors connected with the inbound movement not only in order to work out such equalization, but also because it was concerned with proportional rates for but parts of through transportation.

In the Supplemental Report of December 13, 1938, in *Southwestern Millers' League* v. *A. T. & S. F. Ry. Co.*, 231 ICC 130, it developed that, after the Interstate Commerce Commission had prescribed the varying proportional rates east of the gateways with a separate proportional east of Chicago on traffic from the Northwest three cents higher than the proportional on traffic from the Southwest, this higher Northwest proportional would be applied on traffic originating in the Southwest but moving to Chicago via intermediate gateways in the Northwest. The Commission, at page 131, stated:

> "The character of the through traffic from Kansas City and other points in Trans-Mississippi River Territory does not change merely because it passes through and is stopped in transit at Minneapolis or other intermediate transit points in Northwest Territory."

The Commission clarified its findings in the *Southwestern Millers' League case*, so as to make it clear that the ex-Trans-Mississippi River, or lower proportional, would apply east of Chicago on grain originating in Trans-Mississippi River Territory, even when such grain moved to Chicago through Northwest Territory.

The Commission there was considering solely the proper proportional to apply to the traffic east of Chicago and the related gateways, and with this decision we have the following practical operation:

(1) A car of grain may move from Minneapolis to Chicago;

(2) A car of grain may move from Kansas City to Chicago;

(3) A car of grain may move from Kansas City to Minneapolis and thence to Chicago;

Two of these cars of grain actually came into Chicago from Minneapolis;

All three of these cars may later be reshipped to Columbus, Ohio, or any other common point in Central Territory.

The handling from Chicago to that common point would be substantially the same. The three cars could move on the same train, over the same railroad, and be delivered to the same dealer at destination. Yet, the grain in one of the cars from Minneapolis, if that grain originated in the Northwest, would be billed at the Northwest proportional. The grain in the other two cars would move under the ex-Trans-Mississippi River proportional, even though one of the cars came directly from Kansas City, whereas the other car reached Chicago via a Northwest gateway.

It can readily be seen that the Commission has properly considered many factors pertaining to the handling of the traffic, which factors are not limited solely to the transportation accorded under the proportional rate factor. When we consider rates in the nature of proportional rates, it is clear that they could not be properly fixed unless such circumstances and conditions are considered, because on that leg of the transportation covered by the proportional rate, in the absence of such consideration, there would be nothing to distinguish the traffic from local traffic, and all rates would be the same. There could be no proportional factors.

The rates east of the gateways to destinations in Trunk Line and New England Territories have for years been arranged, and are now adjusted, so that grain from the Northwest may move through either Chicago or Peoria for the same charge, and grain from Trans-Mississippi may move through either Chicago, Peoria or St. Louis for the same charge (see Exhibit 7, R. E. 38, introduced R. 220, explained R. 218). This requires a varying level of proportional rates east of Peoria, even

though the amounts of the charge to these destinations are the same east of Chicago. This is shown by Exhibit 7, pages 2 and 3, *supra*. It will be noted from the bottom line of page 3 that the domestic rate from Peoria to New York on grain from Minneapolis is 26 cents, whereas it is 28 cents from Peoria to New York on grain from Kansas City.

It will be noted further that this gateway equalization requires proportional rates east of Peoria to Trunk Line and New England Territories which are greater on grain from Trans-Mississippi River Territory than on grain from the Northwest; whereas, just the reverse is true east of Peoria to destinations in Central Territory. To this latter territory, the proportional rates east of Peoria are lower on grain from Trans-Mississippi River Territory than they are on grain from the Northwest. Compare page 1 with pages 2 and 3 of Exhibit 7, *supra*. The same picture is shown on page 2, Exhibit 68 (R. E. 104, introduced R. 1394).

Because the measure of the inbound rate to Chicago had no effect upon the Chicago price, the Court concluded that the measure of this inbound rate should also have no bearing upon the level of the proportional rates east of Chicago (findings Nos. 27, 24 and 26). If the movement into Chicago is as separate and distinct as the Court would have it, and if transportation factors connected with that inbound movement may not be considered in fixing the level of the outbound proportional rate, just where is that equity and where does it arise, which the Court itself would then use in according to the ex-barge grain the use of the proportional rates lower than the local rates east of Chicago?

In its regulation of rates, the Commission is not controlled by the purchase price of a commodity. It must

consider all of the transportation factors. *Boren-Stewart* v. *A. T. & S. F. Ry. Co.*, 196 ICC 120, 125, and *U. S.* v. *Illinois Central R. R. Co.*, 263 U. S. 515, 524.

A grain rate structure is fixed for the proper complete rating of the grain from each of the origin areas to destination. In order that that rate structure might be kept intact and continue to be proper for that grain of each origin area, it is often found necessary that the grain which may arrive at a common gateway be treated differently beyond that gateway.

In *Board of Trade of Kansas City* v. *U. S.*, 314 U. S. 534, this Court recently considered problems connected with the grain rate structure which are very pertinent to our present case and point, and approved the action of the Commission in limiting the application of proportional rates on grain in a manner deemed necessary by the Commission for preservation of that rate structure. We respectfully refer the Court to that portion of the decision beginning on the bottom of page 537. Under rates prescribed by the Commission, grain could move from Kansas City to Chicago via routes through Omaha. If the grain moved direct, or if it was transited at any point between Kansas City and Omaha, the charge for the entire movement was 16 cents, but if the grain was transited at Omaha, the charge for the total movement was 22.5 cents. The difference in the charges depended solely on where the stop may have been made, but in either instance the route and the transportation service would be substantially the same.

The service east of Chicago, which the Court in the instant case noted was identical on ex-barge, ex-rail and ex-lake grain, unloaded into the elevators at Chicago, would also be the same on grain, unloaded in elevators in Chicago, which may have been trucked to Chicago from origins along the Illinois Waterways or which may

have arrived from the Northwest or from Trans-Mississippi origin territory or which may have come in from Illinois origins via rail. Consideration of the transportation factors pertaining to the grain from the various areas makes it clear that the inbound service must be considered by the Commission in determining the lawfulness of rates applied, or proposed to be applied, for the movements from Chicago. This theory and basis of rate-making antedates even the enactment of the Interstate Commerce Act. In *A. T. & S. F. Ry. Co.* v. *U. S.*, 279 U. S. 768, the Supreme Court at 778 states:

> "The practice by which grain shipped to a primary market is given, when shipped out, the benefit of the low rate which would normally have applied if the grain had actually been shipped from the country point through to its ultimate destination, antedates the enactment of the Interstate Commerce Act. *Transit Case*, 24 ICC 340, 348."

Under this theory, the varying proportional rates beyond the primary market or rate-break point, must be fixed in relation to, and after a consideration of, the inbound movement, for in no other way would it be possible to make the total through charge equal to anything, either the through rate from the country point or the through charges from some other area.

In the above case, this Court had occasion to consider proportional rates in varying amounts beyond any one gateway. At page 773, the Court quoted with approval from a decision of the Commission in *Southern Kansas Grain Association* v. *C. R. I. & P. Ry. Co.*, 139 ICC 641, at page 653, as follows:

> " 'The method of publication may be briefly explained by the statement that proportional rates are provided from Kansas City in varying amounts depending upon the point of origin of the grain, which, when added to the local rates into Kansas City, are equal to the specific rates published by the

lines which originate the grain. If these varying proportionals or balances were not maintained the lines which serve Kansas City, but not the grain fields, would be compelled to apply the flat proportional rate of 30.5 cents from that market to the Gulf ports. That flat proportional exceeds the balances maintained by other lines and therefore would attract little, if any, traffic. By providing these varying proportionals the lines serving Kansas City have placed themselves on a competitive basis for the outbound movement of grain stored at that point.' "

The Division in the first decision approved as reasonable the application of the Official Territory rate level on Official Territory transportation (246 ICC 353, 366) (R. 19). In the decision of the entire Commission (R. 47, 248 ICC 307, 309-310), it is stated:

"The proposed ex-barge rates, which are the same as the local rates, range from 17.3 to 25.7 per cent of first class and are substantially below the level of the sixth-class rates (27.5% of first class) which has been prescribed or approved as a reasonable maximum basis in Official Territory. To Central Territory, the barge-rail combinations, even under the proposed schedules, will still be generally lower than the all-rail rates."

The District Court has failed to see the difficulties from a rate standpoint which developed when the barge grain moving up the Illinois Waterways to Chicago secured the benefit of the proportional rate level east thereof.

As stated by the entire Commission (248 ICC 307, 309), it was found by the Division that:

"The maintenance of barge-rail combination rates so much lower than the all-rail rates, particularly where the inbound water haul is so short, results in a break-down of the all-rail grain rate structure from adjacent origins in Illinois and Indiana."

After considering the various issues in the case, the entire Commission concluded, at page 311:

> "The facts of record as detailed by the Division and summarized herein, clearly show that respondents are justified under Section 1 in treating the ex-barge traffic the same as local or ex-truck traffic and that the proposed schedules cannot be condemned as unlawful under Sections 2 and 3 of the Act."

The Commission in reaching its conclusions had before it and properly considered the effect upon the entire grain rate structure, not only of the ex-barge grain as it is presently rated, but also of the restricted application proposed by the rail carriers.

In spite of this being clearly shown of record, the District Court found as a fact (see No. 23, which reads):

> "The breakdown of the rail rate structure referred to by the Commission related to the publication by western lines of intrastate rail rates to Chicago below the normal basis of intrastate rates, and such publication was made in an effort to compete for the inbound haul of grain to Chicago."

The findings of the Commission to which we have heretofore referred, are crystal clear to the effect that the grain rate structure with which the Commission was concerned was the whole structure.

An important part of the whole is the local level within Official Territory, and had the Commission not been concerned with that, there would have been no occasion for the Commission having considered so carefully the proper level of the rates for Official Territory.

In the decision of the Division (246 ICC 353, 366), the reasonableness of the local rate level east of Chicago was considered, and it was stated that these local rates ranged from 17.3 to 25.7 per cent of first class, and were

substantially under the level of the sixth-class rates (27.5 per cent of first class), which the Commission had found in the cases cited in the footnote to be maximum reasonable rates on grain and grain products within Official Territory.

The court found that cases to which the Commission referred treated solely with the local rate level and did not involve consideration of proper proportional rate levels.

In the first place, several of these decisions did treat with proportional rail-rate levels. See *Valley Grain Co., Inc.* v. *C. C. C. & St. L. Ry. Co.*, 159 ICC 223; 167 ICC 190; and *Allen & Wheeler Co.* v. *A. C. & Y. Ry. Co.*, 225 ICC 179.

In the second place, these cases show that, in considering what is termed the local rate level, the Commission was considering rates on grain from origins in Illinois to the East, showing that Illinois is in Official Territory. See *Indianapolis Board of Trade* v. *B. & O. R. R. Co. et al.*, 129 ICC 675.

In the third place, it is this local rate level within Official Territory with which the Commission was concerned.

In addition to the protection of the Official Territory rate level, we must also consider the effect of the present application upon the gateway and territorial equalization. We have heretofore shown that east of Peoria there are varying proportional rates both to Central Territory and to the East. That rate setup east of Peoria, because of these equalizations, results in proportionals to Trunk Line and New England Territories higher in amount on grain from Trans-Mississippi origin area than on grain from the Northwest; whereas, to destinations in Central Territory the proportionals east of Peoria are lower on grain from Trans-Mississippi

River origin area than they are on grain from the Northwest. If *any* difference is discriminatory, and if in judging the propriety of proportionals east of the gateway we cannot consider transportation factors connected with the inbound movement to the gateway, this whole structure of gateway equalization, and equalization of territories such as required in *Southwestern Millers' League* v. *A. T. & S. F. Ry. Co.*, 225 ICC 195, would fall.

That the continued application of the proportional rates from Chicago on ex-barge grain was disturbing the Official Territory rate level was clearly and definitely shown by substantial evidence which the Commission properly considered. (This evidence has been summarized in the statement of the case, pages 10 to 17, inclusive, herein, where record references are given.) It showed that the through charges on Illinois grain moving by barge to Chicago and thence east by rail were lower than the through charges on grain moving all-rail from the same origins to the same destinations by amounts materially in excess of the spreads between the barge charges to Chicago and the corresponding rail rates to Chicago. In other words, through the medium of the application of proportional rates east from Chicago, shippers using barge transportation to Chicago were enjoying savings in through transportation charges in excess of the savings possibly incident to the use of the barges. Obviously, such use of the proportional rates not merely disturbed but, in fact, defeated the Official Territory local level of rates. Furthermore, the use of the proportional rates on ex-barge traffic provided through charges on grain from Illinois lower than the charges on grain from intermediate origins in Indiana and Michigan. The rail haul from Chicago on the ex-barge grain was greater than the rail haul from the intermediate origins, and many of the routes operated directly through such intermediate origins. Clearly,

the existing Official Territory level of rates from those intermediate origins could not be maintained indefinitely under such conditions.

Admittedly, competition of the barge lines operating on the Illinois Waterways had forced reductions in the rates on grain from origins adjacent to this waterway to Chicago. But by no means was this the sole effect of the barge competition, as the court below mistakenly concluded. The application of the proportional rates on the ex-barge traffic in reality caused a disturbance of the rate structure throughout the entire territory in which these proportional rates were applied.

The Interstate Commerce Commission does have the power to protect a reasonable rate adjustment. See *U. S.* v. *Ill. Central R. Co.*, 263 U. S. 515, 525; *Youngstown Sheet and Tube Co. et al.* v. *U. S. et al.*, 295 U. S. 476, 479 and 480; *Scandrett* v. *U. S.*, 32 Fed. Supp. 995, affirmed 312 U. S. 661. To accomplish this purpose it might close a route. *Western Chem. Co.* v. *U. S.*, 271 U. S. 268, 272.

In *Inland Waterways Corp.* v. *A. & R. R. Co.*, 183 ICC 761, the barge line alleged that the restrictions limiting the use of proportional rates so that they applied only on traffic moving all-rail were unduly prejudicial to complainant. There were no through rail-barge rates from the territory involved. In most instances the through charges all-rail were lower than the sums of the rail local rate to the port, plus the barge charge beyond. The barge line was particularly desirous of using these proportional rates on grain. The Commission showed that the proportional rates on the grain and the grain products were devised primarily for the purpose of equalizing the various routes through the gateways with western territory. The Commission gave examples of this equalization (page 764). The Commission stated that the barge line

port-to-port rates were not related to the all-rail rates so that if the proportional rates were applied in connection with the port-to-port rates of the barge, the equalization of the through charges through the respective gateways would be broken down. At page 765, the Commission states:

> "If the proportional rates are made to apply in connection with the barge line, it will be in position through its largely unrestricted control of port-to-port rates to bring about the establishment of through combination rates which will cause similar disadvantage to the all-rail routes and to shippers such as the intervener."

The Commission said (765) that any undue prejudice which existed could and should be removed by the establishment of through routes and joint rates in compliance with the decision in *Through Routes and Joint Rates between Inland Waterways Corporation and Other Common Carriers*, 153 ICC 129. The barge-line traffic was not accorded the use of the proportional rail basis.

The port-to-port rates of the barge lines are still largely beyond the control of the Interstate Commerce Commission. Section 303(b) of the Interstate Commerce Act (Title 49, U.S.C.A., Sec. 903(b) provides:

> "Nothing in this part shall apply to the transportation by a water carrier of commodities in bulk when the cargo space of the vessel in which such commodities are transported is being used for the carrying of not more than three such commodities."

The Commission was not, and properly could not be, unmindful of the entire grain rate structure to and within Official Territory, a structure which has been the subject of much litigation before that body and a structure which in large measure has been prescribed by it. In recognizing that the lawfulness of proportional rates must be determined by consideration of all of the cir-

cumstances and conditions surrounding the through transportation, and in considering the effect upon the entire grain rate structure of the carriers' proposal, the Commission did not act arbitrarily or in excess of its power and did not misconstrue or misapply the governing provisions of the Act. We respectfully submit that the court below clearly erred in failing to recognize the extent of the circumstances and conditions which necessarily the Commission was required to consider in determining the lawfulness of the schedules in controversy.

The Court Erred in Holding That There Was No Evidence in the Record to Support the Commission's Finding That the Proposed Schedules Would Not Prohibit the Movement of Grain by Barge-Rail Even to Trunk Line Territory.

In finding of fact No. 18, the court stated, in part:

> "There is no evidence in the record to support the finding of the Commission that the proposed schedules will not prohibit the movement by barge-rail, even to Trunk Line Territory. * * *"

The court thereafter outlined some of the circumstances, about which there was evidence in the record, concerning the marketing of grain at Chicago, and found that ex-barge, ex-rail, and ex-lake grain was purchased and sold on the Chicago market at any given time at the same price, that ex-barge, ex-lake and ex-rail grain was sold at eastern destinations at prices named on a basis delivered at such destinations, and that such prices were predicated directly on the freight rate from Chicago to the destinations.

From these facts the Court concluded that since the tariffs in controversy would prohibit the application of proportional rates on ex-barge grain, thus requiring the application of the higher local rates from Chicago, ex-barge grain could not move by rail from Chicago because

the delivered price at destination would exceed the delivered price on ex-lake grain entitled to use the proportional rates, by the extent of the spreads between the proportional rates and the local rates.

A review of the record discloses that there was evidence therein supporting the Commission's contrary finding that operation of the suspended schedules would not necessarily prohibit the movement of ex-barge grain eastbound from Chicago by rail.

A witness testified (R. 267-269) that the matter of supply and demand would determine whether ex-barge grain would move from Chicago to Trunk Line Territory under the local rates that would be applied thereon if the application of the proportional rates was restricted as proposed; and in so testifying, this witness pointed to the fact that a large part of the grain moving via rail east of Chicago does so for transit intermediate to the seaboard, a privilege which is not accorded grain moving east of Chicago via lake.

The Commission's finding was predicated further upon definite evidence of record showing that the through charges on grain moving from Illinois origins via barge to Chicago, and thence via rail to destinations in Central Territory under the local rates from Chicago that would be applied if the suspended schedules were made operative, still would be lower than the through charges for the movement of such grain all-rail from the same Illinois origins to the same destinations in Central Territory either over direct routes or over routes through Chicago. Exhibit No. 69, R. E. 107, introduced R. 1394, shows that from Morris, Illinois, a representative origin of barge grain, via Chicago to Indianapolis, Indiana, Detroit, Michigan, and Circleville, Ohio, representative destinations in Central Territory, the through charges via the barge-rail routes under the adjustment

that would result from operation of the suspended schedules, would be lower than the all-rail rates from Morris to the same destinations.

While the evidence before the Commission may not have established beyond all question of doubt that operation of the suspended schedules would not prohibit the movement of ex-barge grain by rail east from Chicago, the testimony established that as a reasonable presumption. The Commission concluded that the weight of the evidence favored this presumption. Appellants respectfully submit, therefore, that the court below erred in finding that the Commission's conclusion was unsupported by any evidence and the court below erred further in substituting its judgment for the judgment of the Commission upon the weight of the evidence in finding affirmatively that operation of the suspended schedules would prohibit such movements.

The Railroads Are Not Proper Defendants.

The complaints joined six of the rail lines operating east of Chicago, which were parties to the schedules in controversy, and prayed (Cargill complaint, R. 133, at 146) that these railroads be enjoined from making effective and enforcing the changes in their tariffs and schedules of rates approved as lawful by the Commission in the order assailed herein, and (Inland Waterways complaint, R. 14) from making effective said changes in tariffs unless and until approved as lawful by a lawful order of the Commission.

In the statutes establishing the procedure for an action to set aside an order of the Interstate Commerce Commission (Urgent Deficiencies Act of October 22, 1913, 38 Stat. 220, Title 28 U.S.C.A., Secs. 46, 47, Appendix 2-s and 2-t herein), there is no provision for an action against any one or more of the rail carriers who are subject to supervision and control by the Interstate

Commerce Commission. Section 46 of the Act provides that suits to enjoin any order of the Commission shall be brought in the District Court against the United States.

The character of the relief against the individual rail lines for which these complaints prayed, even if any rights to such relief existed, which we deny, is not within the jurisdiction of the specially constituted three-judge court which entered the decree herein, or within the special procedure provided by Congress for review of orders of the Interstate Commerce Commission. See *Powell* v. *U. S.*, 300 U. S. 276; *U. S.* v. *Idaho*, 298 U. S. 105, 109, 110; *P. & W. Va. Ry. Co.* v. *U. S.*, 281 U. S. 479, 488; *Manhattan Transit Co.* v. *U. S.*, 24 Fed. Supp. 174, 177. Any injunctive relief against these railroad defendants, in cases where appropriate, is provided by the normal procedure within the jurisdiction of the District Court of the United States. In such procedure, the cause would be heard initially by a single judge, the action of the District Court would be appealable only to a Circuit Court of Appeals, and the subsequent appeal therefrom to this Court would be by writ of certiorari.

Where the carriers are controlled by the order of the Commission, it would seem to be completely unnecessary in considering the action of the master to also treat directly with the subject. That such a matter was considered ill-advised, is made clear when we consider arrangements made by the Urgency Deficiencies Act as to the nature of the proceeding and the specification of parties.

Another important point is the fact that the Interstate Commerce Act in Section 15-7 (Title 49, U. S. Code, Sec. 15, Par. 7) provides that whenever there is filed with the Commission a schedule setting up a new rate or practice, the Commission may suspend such new tariff provision, but not for a longer period than seven months beyond the time when it would otherwise go into effect.

At the end of this time the proposed rate or regulation was to go into effect, even though the Commission had not determined its proceedings in connection therewith. This was to preserve at least the color of that definite right which has always been accorded to the carriers of filing whatever tariffs they may deem advisable.* This protects the initiative of the carriers. The provisions of the Interstate Commerce Act outline exclusively the methods under which the proposed rate schedules may be attacked. See *Director General* v. *The Viscose Co.*, 254 U. S. 498.

If a dissatisfied shipper could bring a proceeding in court to secure an injunction against individual railroads, after the expiration of the seven months' period of suspension as provided by Section 15(7) of the Interstate Commerce Act, there would be no effective time limit to the suspension of operation of schedules initiated by railroads.

Complainants, as authority for their position that the court below had jurisdiction over the railroads named defendants, cited in their brief in the court below, *Chicago Junction case,* 264 U. S. 258. In that case, brought to set aside an order of the Commission, affirmative relief against individual railroads was prayed. The relief requested, which was for an order requiring the cancellation of a lease and a sale of stock necessary for restoration and maintenance of the *status quo* during the progress of the litigation, was obtained, but for the reason that only by such relief could irreparable damage be prevented. In the instant case, complainants have an adequate remedy if the carriers establish and enforce schedules of rates which are unlawful; hence, the complainants here do not require the protection evidenced in the cited case.

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* *U. S.* v. *Illinois Central R. R.*, 263 U. S. 515, 522; *I. C. C.* v. *C. G. W. Ry. Co.*, 209 U. S. 108, 118, 119.

The Inland Waterways Corporation and A. L. Mechling, Intervener, Do Not Have the Right to Maintain an Action to Enjoin the Order of the Interstate Commerce Commission.

This action was brought by the barge lines, who admittedly conduct their transportation of grain via the Illinois Waterways to Chicago on a port-to-port basis without any common arrangement with carriers beyond Chicago for through transportation, to protect their competitive position in connection with the transportation of grain to Chicago. The barge lines claim that the protection of their competitive position and certain provisions of the Interstate Commerce Act, as amended September 18, 1940, particularly the provisions of the National Transportation Policy and Section 3(4) thereof, afford the rights necessary for maintenance of an action of this character.

The cases are uniform in holding that a suit to vacate an order of the Interstate Commerce Commission may be brought only by a party possessing a right of his own which has been violated by the order. The fact that the order might work to the detriment of the economic position of plaintiff, or might make its competitive relationship less secure, does not furnish the basis for an action to vacate the Commission's order. *Alexander Sprunt & Son, Inc., et al.* v. *U. S.* 281 U. S. 249; *Merchant Truckmen's Bureau of New York* v. *U. S., et al.*, 16 Fed. Supp. 998, 999; *Pennsylvania R. Co.* v. *U. S., et al.*, 40 Fed. 2d 921, 924; *United States, et al.* v. *Ill. Central R. Co.*, 291 U. S. 457, 465; *Pittsburgh & W. Va. Ry. Co.* v. *U. S., et al.*, 281 U. S. 479; *Moffat Tunnel League, et al.* v. *U. S., et al.*, 289 U. S. 113; *Mississippi Valley Barge Line Co.* v. *U. S., et al.*, 292 U. S. 282, 289; *L. Singer & Sons, et al.* v. *Union Pacific R. Co.*, 311 U. S. 295, 303; *Fairchild* v. *Hughes*, 258 U. S. 126, 129; *Perkins* v. *Lukens Steel Co.*, 310 U. S. 113, 125; *Ex Parte*

Albert Levitt, 302 U. S. 633, 634; *Youngstown Sheet & Tube Co.* v. *U. S.*, 7 Fed. Supp. 33 (see particularly at page 36), affirmed 295 U. S. 476.

Clearly then the mere desire of the barge lines to protect their competitive position does not furnish a right upon which they may properly base this action.

In another section of this brief, we have discussed at length the declaration of the National Transportation Policy, the amendment of Section 3(4), and the various other changes in the Interstate Commerce Act effected September 18, 1940. The Court's attention is respectfully directed to that section herein (pages 48 to 65, inclusive), where it is made clear that no provision of that Act affords these plaintiffs the right to maintain this action, but that certain provisions of that Act do afford them rights to maintain initially before the Commission, actions of a different character to effectuate their purposes, rights which they have not attempted to exercise insofar as their grain traffic is concerned.

The authorities cited by the barge lines in their briefs in the court below do not sustain their contention, for those cases concern definite rights quite distinct from any of the grounds upon which the barge lines here must rest. One nature of case so cited, *Chicago I. & L. Ry. Co.* v. *U. S.*, 270 U. S. 287, rests on the right of connecting lines in a through route to reasonable, proper, and equal facilities for the interchange of traffic. The through route and joint rates had been established in response to an order of the Commission in *Chicago Lakeshore & South Bend Ry. Co.* v. *Director General*, 58 ICC 647. The Supreme Court was considering an order of the Commission made in a later proceeding, *Chicago Lakeshore & South Bend Ry. Co.* v. *L. E. & W. Ry. Co.*, 88 ICC 525, which was an order implementing the through route. Another nature of case cited by appellees, such as *Claiborne-Annapolis Ferry Co.* v.

U. S., 285 U. S. 382, and *Alton R. R. Co.* v. *U. S.*, 315 U. S. 15, rest upon a right given by statute which right was considered in *T. & P. Ry. Co.* v. *G. C. & S. F. Ry. Co.*, 270 U. S. 266, see 273, and *Western Pacific California R. R. Co.* v. *Southern Pacific Co.*, 284 U. S. 47, see page 51.

CONCLUSION.

The order of the Interstate Commerce Commission meets the test to which it should have been subjected. The order is within the jurisdiction of the Commission, was made after full hearing, was based on essential findings supported by evidence and free from any error in the application of law.

The error of the court below was twofold, in that the court not only failed to subject the order to the proper test, but went beyond the proper limits of court review and erroneously substituted its judgment for that of the Commission.

It is respectfully submitted that the decree of the District Court should be reversed and the cause remanded with directions to dismiss the bills of complaint.

LEO P. DAY,
Solicitor for The New York Central Railroad Company.

WILLIS T. PIERSON,
Solicitor for Erie Railroad Company.

EDWARD A. KAIER,
Solicitor for The Pennsylvania Railroad Company.

HORACE L. WALKER,
LAWRENCE CHAFFEE,
Solicitors for The Chesapeake and Ohio Railway Company, and The New York, Chicago and St. Louis Railroad Company.

FRANK H. COLE, JR.,
Solicitor for The Baltimore and Ohio Railroad Company.

APPENDIX 1.

(a)

The note, as now effective, governing application of the proportional rates east of Chicago to destinations in Trunk Line and New England Territories:

Note 20--Application of re-shipping or proportional rates from Chicago, Joliet, Kankakee, Milwaukee, Manitowoc, etc.

Where reference is made to this note, rates apply as re-shipping or proportional rates applicable on traffic reaching the re-shipping point via a rail or water transportation line that can furnish to the outbound carrier freight bill or like documentary evidence as to the origin of the traffic and rate paid to the re-shipping point and will only apply on such traffic when originating at points from which no joint through commodity rates are in effect in connection with the in-bound carrier via the re-shipping point from original point to final destination; provided, that in no case shall the combination through rate to and from the re-shipping point via rail be less than the local rate from the re-shipping point to destination, the difference necessary to protect the local rates from the reshipping point to be added to the re-shipping rate therefrom.

Effective January 15, 1924. Agent B. T. Jones' Tariff I.C.C. 1373 Supplement 11.

These rates are applicable on Ex-lake shipments as of the date such shipments leave the lake port.

The Ex-Lake Grain and (or) Grain Product rates will apply only on Grain and (or) Grain Products which arrive at Chicago, Milwaukee or Manitowoc via lake, also on Grain Products milled from Grain

which arrives at these ports via lake. The Ex-Lake rates covered hereby are applicable as of the date shipments leave the respective points named herein.

These rates are subject to transit rules and regulations published in tariffs lawfully on file with the Interstate Commerce Commission.

Rates also apply on through billed shipments originating at points from which no joint through commodity rates are in effect, not stopped in transit at reshipping points subject to this application.

(b)

The proposed note to govern the use of the proportional rates east of Chicago to Trunk Line and New England Territories

"NOTE 20

"APPLICATION OF RE-SHIPPING OR PROPORTIONAL RATES FROM CHICAGO, JOLIET, KANKAKEE, MILWAUKEE, MANITOWOC, ETC.

"Where reference is made to this Note, rates apply as re-shipping or proportional rates applicable on:

"(a) Traffic reaching the re-shipping point via a rail transportation line that can furnish to the out-bound carrier freight-bill or like documentary evidence as to the origin of the traffic and rate paid to the re-shipping point, and will only apply on such traffic when originating at points from which no joint through commodity rates are in effect in connection with the inbound carrier via the re-shipping point from original shipping point to final destination; provided, that in no case shall the combination through rate to and from the re-shipping point via rail be less than the local rate from the re-shipping point to destination, the difference necessary to protect the local rates from the re-shipping

point to be added to the re-shipping rate therefrom. (See Exception below.)

"(b) On ex-lake shipments which arrived by Lake Carrier Vessel at Chicago, Ill., Kewaunee, Wis., Mackinaw City, Mich., Manitowoc, Wis., Menominee, Mich., Manistique, Mich., and Milwaukee, Wis. (Will not apply on Ex-River, Canal, River-Canal or Canal-River traffic, arriving via Illinois waterways, viz.: Rivers, Canals and connecting waterways, except rates will apply on shipments moving from Kansas City, Mo., to Chicago, Ill., under rates published in Item 3632 of Federal Barge Lines Freight Tariff No. 31-J, I.C.C. No. 148, supplements thereto or successive issues thereof. These rates are applicable on Ex-Lake shipments as of the date such shipments are reshipped via rail from the Lake Ports named above.

"These rates are subject to transit rules and regulations published in tariffs lawfully on file with the Interstate Commerce Commission.

"Rates also apply on through billed shipments originating at points from which no joint through commodity rates are in effect, not stopped in transit at re-shipping points subject to this application.

"EXCEPTION.—The foregoing provision as to application of the local rates as minima will *not* apply on shipments of Malt and Malt Sprouts, C.L., originating at Jefferson Junction, Wis. EXPIRATION DATE ELIMINATED.)

(c)

The presently effective note governing the application of the proportional rates east of Chicago to destinations in Central Territory.

"NOTE 40

APPLICATION OF RESHIPPING OR PROPORTIONAL RATES ON TRAFFIC ORIGINATING IN NORTHWEST TERRITORY

"Where reference is made to this note rates will apply as follows:

"Rates apply as reshipping or proportional rates on traffic reaching the reshipping point via a rail or water transportation line that can furnish to the outbound carrier freight bill or like documentary evidence as to the origin of the traffic and rate paid to the reshipping point, and will only apply on such traffic when originating at points in NORTHWEST TERRITORY (as described below), or as otherwise stated; provided, that in no case shall the combination through rate to and from the reshipping point be less than the local rate from the reshipping point to destination; the difference necessary to protect the local rate from the reshipping point to be added to the reshipping rate therefrom.

"These rates are subject to transit rules and regulations published in tariffs lawfully on file with the Interstate Commerce Commission.

"Rates also apply on through billed shipments originating at points in territory as described in this Note not stopped in transit at reshipping points subject to this application.

"GRAIN (NORTHWEST)

"Rates on Grain, subject to this Note will apply on Grain, carloads (see Note 5, page 73), originating in the following described territory:

"(a) Points in Wisconsin.

"(b) Points in Upper Peninsula of Michigan.

"(c) Points west of the Minnesota-Wisconsin State Line, except points in Trans-Mississippi River Territory as described in Note 20, pages 77 and 78.

"(d) Points in the Dominion of Canada, viz.: All points in the Provinces of Alberta, British Columbia, Manitoba and Saskatchewan.

"(e) On shipments which arrive by Boat Lines at Chicago, Ill., Kewaunee, Wis., Mackinaw City, Mich., Manitowoc, Wis., Menominee, Mich., Manistique, Mich., and Milwaukee, Wis."

(d)

The proposed note governing the application of the proportional rates east of Chicago to destinations in Central Territory.

"NOTE 40

"APPLICATION OF RESHIPPING OR PROPORTIONAL RATES ON TRAFFIC ORIGINATING IN NORTHWEST TERRITORY

"Where reference is made to this Note, rates apply as reshipping or proportional rates on:

(a) Traffic reaching the reshipping point via a rail transportation line that can furnish to the outbound carrier freight bill or like documentary evidence as to the origin of the traffic and rate paid to the reshipping point and will only apply on such traffic when originating at points in "Northwest Territory" as described below; provided that in no case shall the combination through rate to and from the reshipping point be less than the local rate from the reshipping point to destination, the difference necessary to protect the local rates from the reshipping point to be added to the reshipping or proportional rate therefrom.

'Description of Northwest Territory:

"Points in Wisconsin.

"Points in Upper Peninsula of Michigan.

"Points west of the Minnesota-Wisconsin State Line except points in Trans-Mississippi River territory as described in Note 20, pages 77 and 78 of tariff as amended.

"Points in Dominion of Canada, viz.: all points in the provinces of Alberta, British Columbia, Manitoba and Saskatchewan.

"(b) On Ex-Lake shipments which arrived by Lake Carrier Vessel at Chicago, Ill., Kewaunee, Wis., Mackinaw City, Mich., Manitowoc, Wis., Menominee, Mich., Manistique, Mich., and Milwaukee, Wis. (Will

not apply on Ex-River, Canal, River-Canal or Canal-River traffic, arriving via Illinois waterways viz., Rivers, Canals and connecting waterways). These rates are applicable on Ex-Lake shipments as of the date such shipments are reshipped via rail from the Lake Ports named above.

"These rates are subject to transit rules and regulations published in tariffs lawfully on file with the Interstate Commerce Commission.

"Rates also apply on through billed shipments originating at points in territory as described in this Note, not stopped in transit at reshipping points subject to this application."

APPENDIX 2.

Statutes Cited.

a. The National Transportation Policy

(Act September 18, 1940, c. 722, Title 1, Section 1, 54 Stat. 899, Title 49 U.S.C.A., preceding Section 1.)

"It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy."

b. Section 500 of the Transportation Act of 1920

(U. S. Code Title 49, Sec. 142—February 28, 1920, c. 91, Sec. 500, 41 Stat. 499.)

"It is declared to be the policy of Congress to promote, encourage, and develop water transpor-

tation, service and facilities in connection with the commerce of the United States, and to foster and preserve in full vigor both rail and water transportation.

"It shall be the duty of the Secretary of War, with the object of promoting, encouraging and developing inland waterway transportation facilities in connection with the commerce of the United States, to investigate the appropriate types of boats suitable for different classes of such waterways; to investigate the subject of water terminals, both for inland waterway traffic and for through traffic by water and rail, including the necessary docks, warehouses, apparatus, equipment, and appliances in connection therewith, and also railroad spurs and switches connecting with such terminals, with a view to devising the types most appropriate for different locations, and for the more expeditious and economical transfer or interchange of passengers or property between carriers by water and carriers by rail; to advise with communities, cities, and towns regarding the appropriate location of such terminals, and to cooperate with them in the preparation of plans for suitable terminal facilities; to investigate the existing status of water transportation upon the different inland waterways of the country, with a view to determining whether such waterways are being utilized to the extent of their capacity, and to what extent they are meeting the demands of traffic, and whether the water carriers utilizing such waterways are interchanging traffic with the railroads; and to investigate any other matter that may tend to promote and encourage inland water transportation. It shall also be the province and duty of the Secretary of War to compile, publish, and distribute, from time to time, such useful statistics, data, and information concerning transportation on inland waterways as he may deem to be of value to the commercial interests of the country.

"The words 'inland waterway' as used in this section shall be construed to include the Great Lakes."

The Interstate Commerce Act.

c. Section 1(4) (Title 49, U.S.C.A., Section 1(4) as it read prior to the amendments of September 18, 1940.

"Section 1, par (4). It shall be the duty of every common carrier subject to this chapter engaged in the transportation of passengers or property to provide and furnish such transportation upon reasonable request therefor, and to establish through routes and just and reasonable rates, fares, and charges applicable thereto, and to provide reasonable facilities for operating through routes and to make reasonable rules and regulations with respect to the operation of through routes, and providing for reasonable compensation to those entitled thereto; and in case of joint rates, fares or charges, to establish just, reasonable, and equitable divisions thereof as between the carriers subject to this chapter participating therein which shall not unduly prefer or prejudice any of such participating carriers."

d. Section 1(4) as amended September 18, 1940:

"(4) It shall be the duty of every common carrier subject to this chapter to provide and furnish transportation upon reasonable request therefor, and to establish reasonable through routes with other such carriers, and just and reasonable rates, fares, charges, and classifications applicable thereto; and it shall be the duty of common carriers by railroad subject to this chapter to establish reasonable through routes with common carriers by water subject to chapter 12 of this title, and just and reasonable rates, fares, charges, and classifications applicable thereto. It shall be the duty of every such common carrier establishing through routes to provide reasonable facilities for operating such routes and to make reasonable rules and regulations with respect to their operation, and providing for reasonable compensation to those entitled thereto; and in case of joint rates, fares, or charges, to establish

just, reasonable, and equitable divisions thereof, which shall not unduly prefer or prejudice any of such participating carriers."

e. "Sec. 2 (Title 49 U.S.C.A., Sec. 2.) If any common carrier subject to the provisions of this chapter shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered or to be rendered, in the transportation of passengers or property, subject to the provisions of this chapter, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is prohibited and declared to be unlawful."

f. Section 3(1) (Title 49, U. S. Code, Sec. 3(1)), prior to the amendments of September 18, 1940, read as follows:

"(1) It shall be unlawful for any common carrier subject to the provisions of this Act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, or any particular description of traffic, in any respect whatsoever or to subject any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

By the amendments of September 18, 1940, this paragraph was changed to read as follows:

"(1) It shall be unlawful for any common carrier subject to the provisions of this part to make, give, or cause any undue or unreasonable prefer-

ence or advantage to any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic, in any respect whatsoever; or to subject any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever: Provided, however, that this paragraph shall not be construed to apply to discrimination, prejudice, or disadvantage to the traffic of any other carrier of whatever description."

g. Section 3(3) (Title 49, U. S. Code, Section 3(3), prior to September 18, 1940, read as follows:

"All carriers, engaged in the transportation of passengers or property, subject to the provisions of this part, shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines, and for the receiving, forwarding, and delivering of passengers or property to and from their several lines and those connecting therewith, and shall not discriminate in their rates, fares and charges between such connecting lines, or unduly prejudice any such connecting line in the distribution of traffic that is not specifically routed by the shipper."

By the amendments of September 18, 1940, this paragraph was changed to Section 3(4) and its language to read as follows:

"(4) All carriers subject to the provisions of this part shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines and connecting lines, and for the receiving, forwarding, and delivering of passengers or property to and from connecting lines; and shall

not discriminate in their rates, fares, and charges between connecting lines, or unduly prejudice any connecting line in the distribution of traffic that is not specifically routed by the shipper. As used in this paragraph the term 'connecting line' means the connecting line of any carrier subject to the provisions of this part of any common carrier by water subject to Part III."

h. Section 6(13) (Title 49 U.S.C.A., Section 6(13)) as it read prior to September 18, 1940.

"When property may be or is transported from point to point in the United States by rail and water through the Panama Canal or otherwise, the transportation being by a common carrier or carriers, and not entirely within the limits of a single State, the Interstate Commerce Commission shall have jurisdiction of such transportation and of the carriers, both by rail and by water, which may or do engage in the same, in the following particulars, in addition to the jurisdiction given by the Act to regulate commerce, as amended June eighteenth, nineteen hundred and ten:

(a) To establish physical connection between the lines of the rail carrier and the dock at which interchange of passengers or property is to be made by directing the rail carrier to make suitable connection between its line and a track or tracks which have been constructed from the dock to the limits of the railroad right of way, or by directing either or both the rail and water carrier, individually or in connection with one another, to construct and connect with the lines of the rail carrier a track or tracks to the dock. The Commission shall have full authority to determine and prescribe the terms and conditions upon which these connecting tracks shall be operated, and it may, either in the construction or the operation of such tracks, determine what sum shall be paid to or by either carrier; Provided, That construction required by the Commission under the provisions of this paragraph shall be sub-

ject to the same restrictions as to findings of public convenience and necessity and other matters as is construction required under section 1 of this part.

(b) To establish through routes and maximum joint rates between and over such rail and water lines, and to determine all the terms and conditions under which such lines shall be operated in the handling of the traffic embraced.

(c) To establish proportional rates, or maximum, or minimum, or maximum and minimum proportional rates, by rail to and from the ports to which the traffic is brought, or from which it is taken by the water carrier, and to determine to what traffic and in connection with what vessels and upon what terms and conditions such rates shall apply. By proportional rates are meant those which differ from the corresponding local rates to and from the port and which apply only to traffic which has been brought to the port or is carried from the port by a common carrier by water.

(d) If any rail carrier subject to the Act to regulate commerce enters into arrangements with any water carrier operating from a port in the United States to a foreign country, through the Panama Canal or otherwise, for the handling of through business between interior points of the United States and such foreign country, the Interstate Commerce Commission may require such railway to enter into similar arrangements with any or all other lines of steamships operating from said port to the same foreign country."

i. Section 6(11) as amended September 18, 1940. (c. 722, Title I, Section 8, 54 Stat. 910, formerly paragraph 13, redesignated 11 in these amendments of September 18, 1940).

"When property may be or is transported from point to point in the United States by rail and water through the Panama Canal or otherwise, the transportation being by a common carrier or car-

riers, and not entirely within the limits of a single State, the Interstate Commerce Commission shall have jurisdiction of such transportation and of the carriers, both by rail and by water, which may or do engage in the same, in the following particulars, in addition to the jurisdiction otherwise given by this chapter:

(a) To establish physical connection between the lines of the rail carrier and the dock at which interchange of passenger or property is to be made by directing the rail carrier to make suitable connection between its line and a track or tracks which have been constructed from the dock to the limits of the railroad right-of-way, or by directing either or both the rail and water carrier, individually or in connection with one another to construct and connect with the lines of the rail carrier a track or tracks to the dock. The commission shall have full authority to determine and prescribe the terms and conditions upon which these connecting tracks shall be operated, and it may, either in the construction or the operation of such tracks, determine what sum shall be paid to or by either carrier: Provided, That construction required by the commission under the provisions of this paragraph shall be subject to the same restrictions as to findings of public convenience and necessity and other matters as is construction required under section 1 of this chapter.

(b) To establish proportional rates or maximum, or minimum, or maximum and minimum proportional rates, by rail to and from the ports to which the traffic is brought, or from which it is taken by the water carrier, and to determine to what traffic and in connection with what vessels and upon what terms and conditions such rates shall apply. By proportional rates are meant those which differ from the corresponding local rates to and from the port and which apply only to traffic which has been brought to the port or is carried from the port by a common carrier by water."

j. Section 15(3) (Title 49, U.S.C.A., Section 15(3)), prior to amendments of September 18, 1940).

"Sec. 15, par. (3). The Commission may, and it shall whenever deemed by it to be necessary or desirable in the public interest, after full hearing upon complaint or upon its own initiative without a complaint, establish through routes, joint classifications, and joint rates, fares, or charges, applicable to the transportation of passengers or property, or the maxima or minima, or maxima and minima, to be charged (or, in the case of a through route where one of the carriers is a water line, the maximum rates, fares, and charges applicable thereto), and the divisions of such rates, fares, or charges as hereinafter provided, and the terms and conditions under which such through routes shall be operated; and this provision, except as herein otherwise provided, shall apply when one of the carriers is a water line. The commission shall not, however, establish any through route, classification, or practice, or any rate, fare, or charge, between street electric passenger railways not engaged in the general business of transporting freight in addition to their passenger and express business, and railroads of a different character; nor shall the commission have the right to establish any route, classification, or practice, or any rate, fare, or charge when the transportation is wholly by water, and any transportation by water affected by this chapter shall be subject to the laws and regulations applicable to transportation by water."

k. Section 15(3) as amended September 18, 1940. (c. 722, Title I, Section 10 (a-d), 54 Stat. 911, 912; Title 49, U.S.C.A. Section 15(3).)

"(3) The Commission may, and it shall whenever deemed by it to be necessary or desirable in the public interest, after full hearing upon complaint or upon its own initiative without complaint, establish through routes, joint classifications, and joint rates,

fares, or charges, applicable to the transportation of passengers or property by carriers subject to this chapter, or by carriers by railroad subject to this chapter and common carriers by water subject to chapter 12 of this title, or the maxima or minima, or maxima and minima, to be charged, and the divisions of such rates, fares, or charges as hereinafter provided, and the terms and conditions under which such through routes shall be operated. The Commission shall not, however, establish any through route, classification, or practice, or any rate, fare or charge, between street electric passenger railways not engaged in the general business of transporting freight in addition to their passenger and express business, and railroads of a different character. If any tariff or schedule canceling any through route or joint rate, fare, charge, or classification, without the consent of all carriers parties thereto or authorization by the Commission, is suspended by the Commission for investigation, the burden of proof shall be upon the carrier or carriers proposing such cancelation to show that it is consistent with the public interest, without regard to the provisions of paragraph (4) of this section."

1. Section 15(6) (Title 49, U.S.C.A. Section 15(6).)

"Sec. 15, par. (6). Whenever, after full hearing upon complaint or upon its own initiative, the commission is of opinion that the division of joint rates, fares, or charges, applicable to the transportation of passengers or property, are or will be unjust, unreasonable, inequitable, or unduly preferential or prejudicial as between the carriers parties thereto (whether agreed upon by such carriers, or any of them, or otherwise established), the commission shall by order prescribe the just, reasonable and equitable divisions thereof to be received by the several carriers, and in cases where the joint rate, fare, or charge was established pursuant to a finding or order of the commission and the divisions thereof are found by it to have been unjust, unreasonable,

or inequitable, or unduly preferential or prejudicial, the commission may also by order determine what (for the period subsequent to the filing of the complaint or petition or the making of the order of investigation) would have been the just, reasonable, and equitable divisions thereof to be received by the several carriers, and require adjustment to be made in accordance therewith. In so prescribing and determining the divisions of joint rates, fares and charges, the commission shall give due consideration, among other things, to the efficiency with which the carriers concerned are operated, the amount of revenue required to pay their respective operating expenses, taxes, and a fair return on their railway property held for and used in the service of transportation, and the importance to the public of the transportation services of such carriers; and also whether any particular participating carrier is an originating, intermediate, or delivering line, and any other fact or circumstance which would ordinarily, without regard to the mileage haul, entitle one carrier to a greater or less proportion than another carrier of the joint rate, fare or charge."

m. Section 15(7), (Title 49, U.S.C.A. 15(7)), as amended:

"(7) Whenever there shall be filed with the commission any schedule stating a new individual or joint rate, fare, or charge, or any new individual or joint classification, or any new individual or joint regulation or practice affecting any rate, fare, or charge, the commission shall have, and it is hereby given, authority, either upon complaint or upon its own initiative without complaint, at once, and if it so orders without answer or other formal pleading by the interested carrier or carriers, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, fare, charge, classification, regulation, or practice; and pending such hearing and the decision thereon the commission, upon filing with such schedule and delivering to the car-

rier or carriers affected thereby a statement in writing of its reasons for such suspension, may from time to time suspend the operation of such schedule and defer the use of such rate, fare, charge, classification, regulation, or practice, but not for a longer period than seven months beyond the time when it would otherwise go into effect; and after full hearing, whether completed before or after the rate, fare, charge, classification, regulation, or practice goes into effect, the commission may make such order with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made within the period of suspension, the proposed change of rate, fare, charge, classification, regulation, or practice shall go into effect at the end of such period; but in case of a proposed increased rate or charge for or in respect to the transportation of property, the commission may by order require the interested carrier or carriers to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require the interested carrier or carriers to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified. At any hearing involving a change in a rate, fare, charge, or classification, or in a rule, regulation, or practice, after September 18, 1940, the burden of proof shall be upon the carrier to show that the proposed changed rate, fare, charge, classification, rule, regulation, or practice is just and reasonable, and the Commission shall give to the hearing and decision of such questions preference over all other questions pending before it and decide the same as speedily as possible."

n. Section 303(b) (Title 49, U.S.C.A., Section 903 (b).)

"(b) Nothing in this chapter shall apply to the transportation by a water carrier of commodities in

bulk when the cargo space of the vessel in which such commodities are transported is being used for the carrying of not more than three such commodities. This subsection shall apply only in the case of commodities in bulk which are (in accordance with the existing custom of the trade in the handling and transportation of such commodities as of June 1, 1939) loaded and carried without wrappers or containers and received and delivered by the carrier without transportation mark or count. For the purposes of this subsection two or more vessels while navigated as a unit shall be considered to be a single vessel. This subsection shall not apply to transportation subject, at the time this chapter takes effect, to the provisions of sections 843-848 of Title 46, as amended."

o. Section 305(b) (Title 49, U.S.C.A., Section 905 (b)).

"(b) It shall be the duty of common carriers by water to establish reasonable through routes with other such carriers and with common carriers by railroad, for the transportation of persons or property, and just and reasonable rates, fares, charges, and classifications applicable thereto, and to provide reasonable facilities for operating such through routes, and to make reasonable rules and regulations with respect to their operation and providing for reasonable compensation to those entitled thereto. Common carriers by water may establish reasonable through routes and rates, fares, charges and classifications applicable thereto with common carriers by motor vehicle. In the case of joint rates, fares, or charges it shall be the duty of the carriers parties thereto to establish just, reasonable, and equitable divisions thereof, which shall not unduly prefer or prejudice any of such carriers."

p. Section 305(c) (Title 49 U.S.C.A., Section 905(c).)

"(c) It shall be unlawful for any common carrier by water to make, give, or cause any undue or unreasonable preference or advantage to any particular person, port, port district, gateway, transit

point, locality, region, district, territory, or description of traffic in any respect whatsoever; or to subject any particular person, port, port district, gateway, transit point, locality, region, district, territory, or description of traffic to any unjust discrimination or any undue or unreasonable prejudice or disadvantage in any respect, whatsoever: PROVIDED, That this subsection shall not be construed to apply to discriminations, prejudice, or disadvantage to the traffic of any other carrier of whatever description. Differences in the classifications, rates, fares, charges, rules, regulations, and practices of a water carrier in respect of water transportation from those in effect by a rail carrier with respect to rail transportation shall not be deemed to constitute unjust discrimination, prejudice, or disadvantage, or an unfair or destructive competitive practice, within the meaning of any provision of this chapter and chapters 1 and 8 of this title."

q. Section 307(d) (Title 49, U.S.C.A., Section 907(d).)

"(d) The Commission may, and it shall whenever deemed by it to be necessary or desirable in the public interest, after full hearing upon complaint or upon its own initiative without a complaint, establish through routes, joint classifications, and joint rates, fares, or charges, applicable to the transportation of passengers or property by common carriers by water, or by such carriers and carriers by railroad, or the maxima or minima, or maxima and minima, to be charged, and the divisions of such rates, fares, or charges as hereinafter provided, and the terms and conditions under which such through routes shall be operated. In the case of a through route, where one of the carriers is a common carrier by water, the Commission shall prescribe such reasonable differentials as it may find to be justified between all-rail rates and the joint rates in connection with such common carrier by water. The Commission shall not, however, establish any through route, classification, or practice, or any rate, fare, or charge, between street electric passenger rail-

ways not engaged in the general business of transporting freight in addition to their passenger and express business, and common carriers by water. If any tariff or schedule canceling any through route or joint rate, fare, charge, or classification, without the consent of all carriers parties thereto or authorization by the Commission, is suspended by the Commission for investigation, the burden of proof shall be upon the carrier or carriers proposing such cancellation to show that it is consistent with the public interest, without regard to the provisions of paragraph (4) of section 15 of this title."

q-1. Section 307(e) (Title 49, U.S.C.A., Section 907(e)).

"(e) Whenever, after hearing upon complaint or upon its own initiative, the Commission is of opinion that the divisions of joint rates, fares, or charges, applicable to the transportation of passengers or property by common carriers by water, or by such carriers and common carriers by railroad or by motor vehicle, are or will be unjust, unreasonable, inequitable, or unduly preferential or prejudicial as between the carriers parties thereto, the Commission shall by order prescribe the just, reasonable, and equitable divisions thereof to be received by the several carriers. In cases where the joint rate, fare, or charge, was established pursuant to a finding or order of the Commission and the divisions thereof are found by it to have been unjust, unreasonable, or inequitable, or unduly preferential or prejudicial, the Commission may also by order determine what (for the period subsequent to the filing of the complaint or petition or the making of the order of investigation) would have been the just, reasonable, and equitable divisions thereof to be received by the several carriers, and require adjustment to be made in accordance therewith. In so prescribing and determining the divisions of joint rates, fares and charges, the Commission shall give due consideration, among other things, to the efficiency with which the carriers concerned are operated, the amount of revenue required to pay their respective operating expenses, taxes, and a fair return on their

property held for and used in the service of transportation, and the importance to the public of the transportation services of such carriers and also whether any particular participating carrier is an originating, intermediate, or delivering line, and any other fact or circumstance which would ordinarily, without regard to the mileage haul, entitle one carrier to a greater or less proportion than another carrier of the joint rate, fare, or charge."

q-2. Section 309(a) (Title 49 U.S.C.A., Section 909(a)).

"(a) Except as otherwise provided in this section and section 911, no common carrier by water shall engage in transporting subject to this chapter unless it holds a certificate of public convenience and necessity issued by the Commission: *Provided, however,* That, subject to section 910, if any such carrier or a predecessor in interest was in a bona fide operation as a common carrier by water on January 1, 1940, over the route or routes or between the ports with respect to which application is made and has so operated since that time (or, if engaged in furnishing reasonal service only, was in bona fide operation during the seasonal period, prior to or including such date, for operations of the character in question) except, in either event, as to interruptions of service over which the applicant or its predecessor in interest had no control, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission as provided in subsection (b) of this section and prior to the expiration of one hundred and twenty days after this section takes effect. Pending the determination of any such application, the continuance of such operation shall be lawful. If the application for such certificate is not made within one hundred and twenty days after this section takes effect, it shall be decided in accordance with the standards and procedure provided for in subsection (c), and such certificate shall be issued

or denied accordingly. Any person, not included within the provisions of the foregoing proviso, who is engaged in transportation as a common carrier by water when this section takes effect may continue such operation for a period of one hundred and twenty days thereafter without a certificate, and, if application for such certificate is made to the Commission within such period, the continuance of such operation shall be lawful pending determination of such application."

Inland Waterways Corporation Act.

r. Sec. 3 (e) of the Inland Waterways Corporation Act as it read just prior to September 18, 1940 (Title 49, U.S.C.A. Sec. 153; as amended in 45 Stat. 978, 48 Stat. 968, 49 Stat. 958, 53 Stat. 1434).

"Sec. 3 (e) Any person, firm, or corporation, including the Inland Waterways Corporation, engaged or about to engage in conducting a common-carrier service upon the Warrior, Mississippi, Columbia, Snake, Sacramento, San Joaquin, or Savannah Rivers, or any tributaries thereof, may apply to the Interstate Commerce Commission and obtain a certificate of public convenience and necessity in accordance with the provisions of section 1 of the Interstate Commerce Act, as amended, and the Interstate Commerce Commission shall thereupon, by order, direct all connecting common carriers and their connections to join with such water carrier in through routes and joint rates with reasonable rules, regulations, and practices, as provided in paragraph (3) of section 15 of the Interstate Commerce Act, as amended, and the Commission shall, in such order, fix reasonable minimum differentials between all rail rates and joint rates in connection with said water service to apply until changed by order of the Commission. Such joint routes, rates, rules, regulations, and practices may be changed by order of the Commission or by agreement of the water carriers and the other participating carriers. The Commission shall further require

the interested common carriers to enter into negotiations for the purpose of establishing equitable divisions of the aforesaid joint differential rates within thirty days after such joint rates are established, and if the carriers are unable to agree upon equitable divisions within one hundred and twenty days from date of publication the Commission shall, by order, determine and establish reasonable divisions to become effective coincident with the effective date of the joint rates. The Commission is hereby given authority upon complaint, at once, and if it so orders without answer or other formal pleading by the interested carrier or carriers, but upon reasonable notice, to enter upon a hearing concerning (1) the reasonableness or lawfulness of any through route or joint rate filed pursuant to such order of the Commission, or (2) the reasonableness of any minimum differentials between all rail rates and joint rates in connection with any water service; or (3) the reasonableness of any division of joint rates ordered by the Commission under the provisions of this Act; and after full hearings the Commission may make such order with reference to any such matters as it may find to be proper and in the public interest. At any such hearing the burden of proof concerning the unreasonableness or unlawfulness of any through route, joint rate, minimum differentials between all rail rate and joint rate in connection with water service, or division of joint rates shall be upon the carrier or carriers making the complaint; and the Commission shall give the hearing and decision of such questions preference over all other questions pending before it, except such questions as are given like preference by law, and decide the same as speedily as possible: Provided, That if the Inland Waterways Corporation sells or leases its transportation facilities to any person, firm, or corporation to be operated as a common carrier, such person, firm, or corporation shall be entitled to a certificate of public convenience and necessity upon making application therefor; and all through traffic arrangements and joint tariffs with rules, regula-

tions, and practices in connection therewith published by the Inland Waterways Corporation and filed with the Interstate Commerce Commission and participated in by other carriers shall remain in full force and effect between such carriers and the person, firm, or corporation purchasing or leasing such transportation facilities from the Inland Waterways Corporation and operating of the same as common carriers until changed by order of the Commission, except that such through-traffic arrangements and joint tariffs, with rules, regulations, and practices therewith, may be changed by mutual consent of the water carrier and the other participating carriers. Joint rail and water rates as herein used shall be deemed to include every movement of traffic in which a water line can participate.

Judicial Code.

s. Title 28, U.S.C.A., Section 46.

"Sec. 46. Suits to enjoin, set aside, annul, or suspend any order of the Interstate Commerce Commission shall be brought in the district court against the United States. The pendency of such suit shall not of itself stay or suspend the operation of the order of the Interstate Commerce Commission; but the court, in its discretion, may restrain or suspend, in whole or in part, the operation of the commission's order pending the final hearing and determination of the suit."

t. Title 28, U.S.C.A., Section 47.

"Sec. 47. No interlocutory injunction suspending or restraining the enforcement, operation, or execution of, or setting aside, in whole or in part, any order made or entered by the Interstate Commerce Commission shall be issued or granted by any district court of the United States, or by any judge thereof, or by any circuit judge acting as district judge, unless the application for the same shall be presented to a circuit or district judge, and shall be heard and determined by three judges, of whom at least one shall be a circuit judge, and unless

a majority of said three judges shall concur in granting such application. When such application as aforesaid is presented to a judge, he shall immediately call to his assistance to hear and determine the application two other judges. Said application shall not be heard or determined before at least five days' notice of the hearing has been given to the Interstate Commerce Commission, to the Attorney General of the United States, and to such other persons as may be defendants in the suit. PROVIDED, THAT, In cases where irreparable damage would otherwise ensue to the petitioner, a majority of said three judges concurring, may, on hearing, after not less than three days' notice to the Interstate Commerce Commission and the Attorney General, allow a temporary stay or suspension, in whole or in part, of the operation of the order of the Interstate Commerce Commission for not more than sixty days from the date of the order of said judges pending the application for the order or injunction, in which case the said order shall contain a specific finding, based upon evidence submitted to the judges making the order and identified by reference thereto, that such irreparable damage would result to the petitioner and specifying the nature of the damage. The said judges may, at the time of hearing such application, upon a like finding, continue the temporary stay or suspension in whole or in part until decision upon the application. The hearing upon such application for an interlocutory injunction shall be given precedence and shall be in every way expedited and be assigned for a hearing at the earliest practicable day after the expiration of the notice hereinbefore provided for. An appeal may be taken direct to the Supreme Court of the United States from the order granting or denying, after notice and hearing, an interlocutory injunction, in such case if such appeal be taken within thirty days after the order, in respect to which complaint is made, is granted or refused; and upon the final hearing of any suit brought to suspend or set aside, in whole or in part, any order of said commission the same requirement as to judges and the same procedure as to expedition and appeal shall apply."

APPENDIX 3.

Assignment of Errors.

1. The Court erred in holding that the order of the Interstate Commerce Commission discriminates against water competition by users of barges.

2. The Court erred in assuming to itself the power to determine whether there was or was not discrimination.

3. The Court erred in concluding that the carrier defendants were properly joined in these suits for hearing by the specially constituted three-judge Court, and that said Court has jurisdiction to enjoin said carrier defendants.

4. The Court erred in concluding that plaintiff Inland Waterways Corporation and intervening plaintiff A. L. Mechling, doing business as A. L. Mechling Barge Line, have an interest and standing which entitle them to bring and maintain their suit.

6. The Court erred in concluding that an injunction should issue as prayed for in the complaints.

7. The Court erred in failing to find that in a court review of an order of the Interstate Commerce Commission the range of issues is narrow, being limited to a determination of whether or not the Commission's order violated the Constitution, exceeded powers delegated by statute, or was such an arbitrary exercise of power as virtually to transcend the authority conferred.

8. The Court erred in substituting its judgment for that of the Interstate Commerce Commission on administrative matters which have been placed by Congress

within the jurisdiction of the Interstate Commerce Commission.

9. The Court erred in weighing the evidence and reaching conclusions upon administrative matters contrary to those found by the Interstate Commerce Commission.

10. The Court erred in failing to find that the order of the Commission was:

a. within the jurisdiction of the Commission;
b. supported by substantial evidence;
c. founded upon essential findings of act;
d. free from any error of law;
e. free from abuse of discretion or power by the Interstate Commerce Commission.

11. The Court erred in ascribing any weight to the Commission's failure to make a finding in its report as to inbound charges on ex-barge grain from St. Louis and Kansas City, Mo., or as to the movement of such barge grain although the facts as to such rates and such movement were contained in the record before it.

12. The Court erred in finding that the reference by the Commission to sixth-class rates (27.5 per cent of first-class) as having been prescribed or approved as a maximum reasonable basis of rates on grain in official territory referred only to cases involving local rates on grain, and not to cases involving reshipping or proportional rates as applied to ex-rail or ex-water grain.

13. The Court erred in finding that there was no evidence in the record to support the finding of the Commission that the proposed schedules will not prohibit the movement by barge-rail, even to Trunk Line Territory. The Court further erred in connection with this finding in substituting its judgment, from the evidence on the point, for the conclusions reached by the Interstate Commerce Commission upon that evidence.

14. The Court erred in finding that the breakdown of the rail rate structure referred to by the Commission related to the publication by western lines of intrastate rail rates to Chicago below the normal basis of intrastate rates, and such publication was made in an effort to compete for the inbound haul of grain to Chicago.

15. The Court erred in finding that if the proposed rates were to become effective, ex-barge grain would pay a greater charge upon reshipment from Chicago to eastern destinations than will ex-rail or ex-lake grain, although the railroad services rendered east of Chicago will be identical upon the reshipment of grain in all three categories.

16. The Court erred in finding that if the proposed rates become effective, there will be less incentive than at present for a shipper to use barge service rather than rail service to Chicago from origins on the Illinois waterways and other rivers connecting therewith, and there will be less incentive for purchasers of grain at Chicago to purchase ex-barge grain.

17. The Court erred in finding that if the order of the Commission of December 1, 1941, becomes effective and the defendant carriers make the changes in rates and charges authorized thereby, the interests of grain producers now enjoying barge transportation into Chicago will be adversely affected.

18. The Court erred in finding that the natural transportation advantages enjoyed by producers of grain located near the Illinois River waterways does not enable them to undersell other grain producers in the Chicago market; that the grain of producers enjoying cheap water transportation is sold delivered at Chicago; that the measure of the inbound rate has no effect upon the Chicago price; that it only affects the net price to producers, and that producers who cannot use water

transportation are under no disadvantage whatsoever because of the transportation advantage of other farmers located upon the waterways.

19. The Court erred in finding that if the order, referred to above, becomes effective, there will be effected, to the extent of the territory involved, a nullification of a consistent national policy to further the improvement of inland waterways in order to provide economical transportation.

20. The Court erred in finding that the action of the Interstate Commerce Commission in the order, referred to above, is, in practical effect, an attempt to bring about a cartelization of barge and rail transportation, which, if consummated, would destroy competition between these two means of transportation.

21. The Court erred in finding that the Interstate Commerce Commission took no evidence addressed to the issue whether the rate proposal in question is in violation of section 3(4) of the Interstate Commerce Act as amended by the Transportation Act of 1940 or contrary to the National Transportation Policy enacted by the last said act; and that the Interstate Commerce Commission passed upon the legality of said rate proposal upon evidence taken without reference to such issues and before they existed.

23. The Court erred in failing to hold that the evidence supports the findings and conclusions of the Interstate Commerce Commission, among which are the following:

(a) That as originally published the so-called northwest proportional rates from Chicago applied on grain originating at points in northwest territory which was specifically defined and did not include any origin points in Illinois.

(b) That the application of the proportional rates to ex-barge traffic will result in a breaking down of the established grain rate structure from west to east.

(c) That the proportional rates from Chicago to central territory destinations on grain originating in Trans-Mississippi River territory are uniformly 3 cents less than the proportional rates applicable on traffic originating in northwest territory, thus maintaining the equalization prescribed in *Southwestern Millers League* v. *Atchison, T. & S. F. Ry. Co.*, 173 I. C. C. 86, 227 I. C. C. 795, 231 I. C. C. 130, and that if the suspended schedules are found justified the increases in the rates to the central territory points named would range from 1.5 to 7.5 cents and to the eastern points named the increase would be substantially 8.5 cents.

(d) That the proposed ex-barge rates, which are the same as the local rates, range from 17.3 to 25.7 per cent of first class and are substantially below the level of the sixth class rates (27.5 per cent of first class) which have been prescribed or approved as a maximum reasonable basis and not unreasonable or otherwise unlawful on grain or grain products within official territory.

(e) That to central territory, the barge-rail combinations, even under the proposed schedules, will still be generally lower than all-rail rates.

(f) That the application of the barge rates to Chicago, plus rail proportionals beyond, bring about evasions of the principle of the Fourth Section of the Interstate Commerce Act.

(g) That the proposed schedules have the effect of maintaining the existing grain rate structure which has already been partially disrupted in the State of

Illinois by the application of the proportional rates on ex-barge grain, and that if the ex-barge grain is permitted to continue to obtain the benefit of the proportional rates east of the rate-break points, that application will, because of Fourth-Section evasions, also disrupt the grain rate structure as far east as Painesville and East Liverpool, Ohio, the latter being approximately 300 miles from Baltimore.

(h) That the application of proportional rates to ex-barge grain discriminates against all-rail movements and in favor of water-rail movements.

(i) That the application of the proportional rates on ex-barge grain has already broken down a portion of the Illinois grain rate structure to Chicago; and an imminent break-down of the grain rate structure east of Chicago is indicated.

(j) That to central territory the barge-rail combination under the proposed schedules will still be generally lower than the all-rail rate from Morris, Ill., a representative origin, via Chicago to Indianapolis, Ind., Detroit, Mich., and Circleville, Ohio, the barge-rail combination being 1.75, 4.75 and 0.75 cents respectively, lower than the all-rail rate.

(k) That to trunk-line territory the inbound barge movement represents a very small portion of the total haul, but about 6 per cent, and to this territory the barge-rail combinations are far below the local rates from the reshipping points in contravention of the Fourth Section rule, while the all-rail rates are in strict conformity with that rule.

(l) That the rail-lake-rail rates from the northwest do not contravene Fourth Section principles or jeopardize the all-rail rate structure.

(m) That the reshipping or proportional rates are in their essence balances of through rates and said

balances are, of course, determined by the measure of the inbound and through rates and properly may vary according to the relative length and nature of the inbound and through service.

(n) That the respondents are justified under section 1 in treating the ex-barge traffic the same as local or truck traffic and that the proposed schedules cannot be condemned as unlawful under sections 2 and 3 of the Act.

24. The Court erred in failing to dismiss the complaints.

APPENDIX 4.

Findings of the Commission.

The following findings of fact, among others, were made in the several decisions, taking up first the decision of Division 2 (246 I.C.C. 353):

The principal points from which grain is barged into Chicago are shown with the distances to Chicago (355).

There is shown the amount of grain received at Chicago by years from 1932 to 1939, inclusive, with the transportation facility used on the inbound movement (355, and Appendix I to Division 2 decision).

The annual production of corn in the State of Illinois from 1932 to 1938, inclusive, is stated (355).

The reason for lake-arrival corn in 1935 to 1937 was shown to be due to the drought in Illinois and in the West in 1934 and 1936 (355).

"Ordinarily, corn is a surplus crop in the portion of Illinois and the small part of Indiana here considered" (355).

This particular Illinois area considered by the Chicago grain dealers as within their trade territory, was specifically set forth (355-356).

"Much of the 65,774,000 bushels of corn received in Chicago in 1939 via rail, and all of the 13,206,000 bushels received over the Illinois Waterways, originated in this section" (Illinois, above referred to) (356).

"In addition to being served by many western rail lines, this producing section is also served by certain of the eastern rail-line respondents in this proceeding, in-

cluding The New York Central Railroad Company" (356).

"Chicago is the greatest corn market in the world and the record in the instant proceedings shows that during 1939 the six Chicago protestants controlled 83 per cent of all the grain coming into this market. They also operate all of the public elevator or storage space at Chicago." (356).

The nature and level of the rail-rate structure from this Illinois area to Chicago is then shown (356).

"Of the 13,206,000 bushels of corn moving into Chicago over the Illinois Waterways during 1939, the record shows that 13,094,962 bushels were transported by six barge lines" (356-357). These six are then named (357) showing the number of bushels and the number of trips made by each.

It was found that practically all the corn transported by the Allied Barge Corporation, and most of that transported by Mechling Barge Line was loaded into barges at Morris or Patonville, Illinois (357).

The Mechling Barge Line was found to have no agreement with respondents with respect to shipments of grain beyond Chicago (357).

The charges of the Mechling Barge Line for transportation to Chicago were found and set out by the Division (357).

The evidence regarding Cooperative Allied Grain Dealers Corporation was carefully considered and the facts as divulged thereby stated (358). These cover the locale of its operations, the handling of its grain by the Allied Barge Corporation, the method of so handling, the charges therefor, and arrangements between it and Continental Grain Company (358-359).

It was found that neither the Cooperative Allied Grain Dealers Corporation or the Allied Barge Corporation had

any agreement with respondents with respect to the shipment of grain beyond Chicago (359).

The evidence of the Federal Barge Line was considered. It was found to be a common carrier; that it hauled little, if any, grain to Chicago from the origins on the Illinois Waterways (359).

The position of the Inland Waterways operating the Federal Barge Line was carefully considered (362), and it was found in connection with their contentions:

(a) "As to section 1, as will be later explained, the rates resulting from the proposed schedules are substantially lower than rates which we have prescribed or found not unlawful on grain within official territory."

(b) In connection with its section 2 allegation, it was found:

> "In *Ex-River Grain from St. Louis to the South*, 203 ICC 385, wherein this protestant also made the same contention as to the section 2 allegation, Division 3 found that the service in the cases of ex-rail and ex-water transportation is not made under substantially similar circumstances and conditions." (363)

(c) "Under the Interstate Commerce Act, as amended September 18, 1940, section 3(1) of part I, undue discrimination, prejudice, or disadvantage by rail carriers to traffic of any other carrier, by water, for example, is not unlawful." (363)

It was found that this barge line has no common arrangement with respondents for a through route, nor has a formal arrangement been entered into in connection with filed or unfiled barge rates (363).

In further considering contentions of the Federal Barge Lines, the Division states at page 376:

> "The Federal Barge Lines alleges that discrimination, prejudice, and preference will result if the

application of the proportional rates is to continue on ex-lake traffic and to be discontinued on ex-barge traffic. In *United States* v. *Illinois Central R. Co.*, 263 U. S. 515, 524, it was stated:

> 'To bring a difference in rates within the prohibition of section 3, it must be shown that the discrimination practiced is unjust when measured by the transportation standard. In other words, the difference in rates cannot be held illegal, unless it is shown that it is not justified by the cost of the respective services, by their values, or by other transportation conditions.'

"In *Ex-River Grain from St. Louis to the South*, 203 ICC 385, in determining a question of alleged discrimination claimed to result through denying proportional rail rates out of the reshipping point on ex-river grain moving into that point on unfiled rates while continuing to apply proportional rates on ex-rail grain, division 3 said, on page 390:

> 'It does not appear that respondents' proposal would be unjust to any shipper. The service in the transportation of the ex-rail and ex-water traffic is not under substantially similar circumstances and conditions. Proportional rates are factors of through rates and such factors may differ with differences in origins or with differences in the character of transportation to the point from which the proportional factors apply.'

"It is asserted by protestants that the weight of authority is against the principle above stated, citing many of our reports and decisions of the United States Supreme Court as well as certain decisions of the English courts. These same decisions were cited in a petition of the Inland Waterways Corporation, operating the Federal Barge Lines, for rehearing and reconsideration in the report from which the above quotation is taken, and after review by the entire Commission that petition was denied."

The rules of the Board of Trade of Chicago were carefully considered, and the facts with regard to such rules and their application were stated. It was found that these rules are trade or commercial practices which do have a definite bearing on the purchase price of grain bought through the market, but which rules have no direct bearing whatever upon the legality of respondents' proposed schedules (360).

The evidence in connection with the elevator capacity was carefully considered, and the facts with regard thereto stated (360-361).

Comparisons were made as to the differences in cost of transportation from this origin area to Chicago, via the different forms of transportation, there being set out in a table what the farmers actually received for the grain in connection with each different type of transportation (361).

It was found that all grain purchased in the Chicago market is either sold f.o.b. or c.i.f. Chicago market price (363).

"A considerable quantity of grain received in the Chicago market is trucked in. Such grain is not, and never has been, accepted for registration nor recorded for transit, and, therefore, has not been able to engage the proportional rates here in issue" (364).

It was found that the grain arriving at Chicago via motor truck originates in the same area as the barged grain (364).

"Both trucked and barged grain is sold in the same consuming territory" (364).

"As originally published, the so-called 'Northwest' proportional rates from Chicago applied on grain originating at points in northwest territory which was specifically defined, and did not include any origin points in Illinois" (365).

The Division sets out at the bottom of page 365, a table illustrating the various rail rate levels applicable east of Chicago. This table carries an illustration of the various proportional rate levels together with the local rate level.

The Division noted that if the suspended schedules were found justified, resulting in the application of the local rates, the increases in the rates to the Central Territory points would range from 1.5 to 7.5 cents, and to the eastern points named, the increase would be uniformly 8.5 cents (366).

The rules covering the application of the various proportional rates were stated and considered (367 *et seq.*)

"The proposed schedules not only contemplate clarification of the schedules, but also have the effect of maintaining the existing grain-rate structure, which has already been partially disrupted in the State of Illinois." (375.)

"If the ex-barge grain is permitted to continue to obtain the benefit of the proportional rates east of the rate-break points, that application will, because of fourth-section evasions, also disrupt the grain-rate structure as far east as Painesville and East Liverpool, Ohio, the latter being approximately 300 miles from Baltimore." (375.)

"To now conclude that the suspended schedules should be found not justified would, in effect, be recognizing a common arrangement between the barge lines and the rail carriers for a continuous through route, despite the fact that the evidence definitely shows none exists. A common arrangement cannot be inferred" (380).

"The application of the proportional rates here in issue on ex-barge grain has already broken down a portion of the Illinois grain-rate structure to Chicago, and an imminent break-down of the grain-rate structure

east of Chicago is also indicated by the evidence. Tariffs on file here show that during the pendency of this proceeding the rates on corn have been substantially reduced within the State of Indiana, as well as from Indiana to Chicago and to certain stations in Ohio." (380-381.)

The Division found that the schedules under suspension were not shown to be unlawful (381).

Findings carried in the decision of the entire Commission (248 I.C.C. 307), are as follows:

"The proposed ex-barge rates, which are the same as the local rates, range from 17.3 to 25.7 per cent of first class and are substantially below the level of the sixth-class rates (27.5 per cent of first class) which has been prescribed or approved as a reasonable maximum basis in official territory."

"To Central Territory, the barge-rail combinations, even under the proposed schedules will still be generally lower than the all-rail rates."

"To Trunk Line Territory, the inbound barge movement represents a very small proportion of the total haul. * * * To this territory, the barge-rail combinations are far below the local rates from the reshipping points in contravention of the fourth-section rule, while the all-rail rates are in strict conformity with that rule."

"To central territory, the ex-rail proportional rates are made 3 cents higher from the Northwest than from trans-Mississippi territory so as to equalize the Twin Cities with Kansas City in connection with the inbound rail rates."

"The inbound haul in connection with the ex-lake traffic is from the head of the lakes or beyond and is much longer than in connection with the ex-barge traffic. The rail-lake-rail rates from the Northwest are there-

fore much higher than the local rates from Chicago or the barge-rail combinations and do not contravene fourth-section principles or jeopardize the all-rail rate structure."

"The proposed schedules will not prohibit the movement by barge-rail even to trunk-line territory, their principal commercial effect being to reduce the profits of the Chicago elevator operators. Furthermore, these operators will still have the benefit of the outbound proportional rates where their inbound haul is by rail or lake and also the benefit of the outbound lake or lake-and-rail rates, irrespective of their inbound haul, and this is likewise true of the Illinois shippers where their inbound haul is by rail or barge, respectively."

"Protestants maintain that the proposed schedules will be unreasonable, unjustly discriminatory and unduly prejudicial against Chicago, the ex-barge traffic, shippers, elevator operators, and dealers interested in the ex-barge traffic, and the Federal Barge Lines as a connecting line, and unduly preferential in favor of other lake ports, ex-rail and ex-lake traffic and in favor of shippers, elevator operators and dealers interested in ex-rail and ex-lake traffic and respondents' connections by rail and lake. This is based primarily on the fact that under the proposed schedules the ex-barge rates will be higher than the ex-rail or ex-lake rates although in each instance the physical carriage beyond the reshipping point is substantially the same. But the latter is also true of local grain, grain brought in by truck, or by rail under intrastate rates, or grain which has forfeited its transit privileges. To adopt protestants' premise would mean that all proportional rates lower than local rates and differing from each other according to the origin of the commodity would have to be condemned. As pointed out by the division, reshipping or proportional rates are in

their essence balances of through rates. Such balances are of course determined by the measure of the inbound and through rates and properly may vary according to the relative length and nature of the inbound and through service. It follows that the protestants' allegations cannot be sustained in this proceeding, although in a proper proceeding we might prescribe proportional rates on the ex-barge traffic lower than local rates or joint barge-and-rail rates lower than the combinations."

"The facts of record as detailed by the division and summarized herein, clearly show that respondents are justified under Section 1 in treating the ex-barge traffic the same as local or ex-truck traffic and that the proposed schedules cannot be condemned as unlawful under sections 2 and 3 of the act."

"On reconsideration of the record in the light of the petitions and replies thereto and our prior decisions, we find that:

(1) The proportional rates here under consideration were legally applicable on the ex-barge traffic where the so-called policing provisions were strictly complied with.

(2) The proposed schedules are shown to be just and reasonable and are not shown to be otherwise unlawful.

The prior findings, 246 I. C. C. 353, are modified and clarified accordingly. The above enumerated petitions are denied in all other respects.

An appropriate order vacating the order of suspension and discontinuing the proceeding will be entered."